The Future of FATF Recommendation 8:
A Foresight Piece

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Contents

Abbreviations

AML	anti-money laundering
CDD	customer due diligence
CFCS	Association of Certified Financial Crime Specialists
CFT	countering the financing of terrorism
CPF	countering proliferation financing
CSO	civil-society organization
DD	due diligence
EDD	enhanced due diligence
DNFBP	designated non-financial businesses and professions
FATF	Financial Action Task Force
FI	financial institution
FIU	financial intelligence unit
FSRB	FATF-style regional body
GONGO	Government-organized non-governmental organization
HR	Human rights
ICNL	International Centre for Not-for-profit Law
IHL	international humanitarian law
IHRL	international human-rights law
IMF	International Monetary Fund
IO	Immediate Outcome
IRL	international refugee law
KYC	know your customer
MER	mutual-evaluation report
ML	money laundering
NPO	non-profit organization
PPP	public–private partnerships
R8	Recommendation 8
RUSI	Royal United Services Institute
SDG	Sustainable Development Goals (the UN's 2030 agenda)
TF	terrorism financing
UN	United Nations
UNSCR	UN Security Council Resolution
UN SR CT & HR	UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
UNGPs	UN Guiding Principles on Business and Human Rights
VASP	virtual asset service providers

FATF-style regional bodies

APG	Asia/Pacific Group on Money Laundering, Sydney, Australia
CFATF	Caribbean Financial Action Task Force, Port of Prince, Trinidad and Tobago
EAG	Eurasia Group, Moscow, Russia
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group, Dar es Salaam, Tanzania
GAFILAT	El Grupo de Acción Financiera de Latinoamérica (Latin America Anti-Money Laundering Group), Buenos Aires, Argentina
GABAC	Le Groupe d'Action contre le blanchiment d'argent en Afrique central (The Action Group against Money Laundering in Central Africa), Libreville, Gabon
GIABA	Inter Governmental Action Group Against Money Laundering in West Africa, Dakar, Senegal
MENAFATF	Middle East and North Africa Financial Action Task Force, Manama, Bahrain
MONEYVAL	Council of Europe Anti-Money Laundering Group, Strasbourg, France

Interviewees

A1	Consultant, financial sector
A2	Banker
A3	Banker
A4	Banking association
A5	Fin-tech firm
A6	International membership organization for anti-financial crime professionals
B1	Team member, UN Special Procedures
B2	Researcher
B3	Academic
B4	Financial crime specialists, think tank
B5	Consultant, risk assessments
C1	International civil-society organization working on organized crime
C2	International civil-society organization working on human rights
C3	International civil-society organization working on the legal environment for civil society
C4	International civil-society organization working on harnessing European philanthropy
D1	International multilateral organization
D2	UN
D3	Academic, ex-International Monetary Fund
E1	Non-profit organization, West Africa
E2	Non-profit organization, Western Balkans and Turkey
E3	Non-profit organization, Southern Africa
E4	Non-profit organization, working in Latin America
E5	Non-profit organization, Western Balkans and Turkey
E6	Non-profit organization, Western Balkans and Turkey
F1	FATF Secretariat
F2	Consultant, former FATF Secretariat
G1	G7 government

EXECUTIVE SUMMARY

This foresight piece sets out to interrogate whether getting rid of the non-profit sector-specific terrorism financing recommendation (FATF's Recommendation 8 [R8]) would help alleviate the unwarranted overregulation, suppression, and financial exclusion to which civil society worldwide has been subjected over the past two decades and more. Interviews with a variety of stakeholders informed the piece and led to the formulation of a dual lens when considering the question. Would it be better or more effective to stick to an 'evolutionary' approach and seek to keep refining the recommendation and how it is implemented so that civil society and its operational environment are not impacted? Or would it be more prudent to go for a 'revolutionary' approach and look to reimagine how non-profits are dealt with in the framework altogether? What would better support the many challenges facing civil society caught up in the web of legislative, regulatory and policy developments set up to combat financial crime?

Overlaying this dual lens, this report tries to answer these questions by viewing them through three relevant vantage points: that of the recommendation itself, that of the national context and that of the market. In terms of the recommendation itself, the root-and-branch approach would be to get rid of it altogether, thereby ending the exceptionalism with which the sector has been viewed under the framework and to start treating it like any other legal entity when assessing terrorism financing risk.

The evolutionary approach, on the other hand, has been under way for a while now, including recent changes to the recommendation and its guidance paper, but further changes (to methodology, training, etc.) are called for to ensure that what is written on paper is translated into practice. There was general consensus among those we interviewed that it might unfortunately be too late for the revolutionary approach at the national level as the 'ghost of R8' will remain in laws, regulations and institutions. But step-by-step changes, though challenging, are possible, even though the dichotomy at the heart of the problem remains: the fact that universal benchmarks, which can only be implemented if they look the same, are sought to be applied to vastly different contexts.

In terms of the third vantage point, that of the market, there might need to be a radical rethink of how the 'risk-based approach' is implemented and where the onus for risk differentiation sits, whether that is with the regulated (i.e. the banks, as happens now) or with the regulators. Our interviewees called for more sustained engagement with the market so it can calibrate its behaviour and systems based on the latest information.

Going beyond just R8 and non-profits, this foresight piece asks wider questions around the accountability of the FATF as a body. Who is the FATF accountable to? How can those harmed by its actions seek redress? Is there adequate transparency around its ways of working, including around the grey-listing process? Who sits at the policymaking table? Who funds the FATF, and from which pot? A major finding of this report is that some countries use money intended for overseas development assistance to fund the FATF, citing UN Sustainable Development Goal 16, and yet the implementation of the FATF framework is leading to the undercutting of these very same development goals in many instances (through civil-society repression and financial de-risking).[1]

Stemming from this intensive interrogation, which is rooted in the practice at the global, regional and national level of many of the stakeholders we spoke to, the piece concludes by outlining what would be prudent and effective to leave behind and what to take forward in terms of the FATF framework on non-profits. It also outlines some dilemmas and some seemingly intractable or knotty issues that need further thinking and research.

1 SDG 16 aims to 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.

CHAPTER 1

INTRODUCTION

This foresight piece will look at the evolution of the Financial Action Task Force (FATF) Framework on Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) from 2012 until the present date (November 2023). It will provide food for thought for further discussion, including with non-profit organizations (NPOs) and their funders working at the intersection of the protection of civic space and the regulation of civil society for the prevention of money laundering (ML) and terrorism financing (TF).

The initiation of the Global NPO Coalition on FATF in 2013, and its advocacy and engagement since, have led to a realization by the FATF of the harms caused to civil society as a consequence of the interpretation of and compliance with the AML/CFT framework by states and private actors. The FATF understands that its reputation as a global standard-setter and watchdog to fight financial crime is at stake when legitimate civil-society organizations are suppressed by governments and cut off from the banking system. The institution has taken several corrective actions to reverse the harm, such as the changes to Recommendation 8 (R8) in 2016 and the Unintended Consequences project initiated in 2021 to understand and mitigate the negative effects of R8 and other standards on the non-profit sector (which has led, in 2023, to further changes to R8) (FATF 2021).

Given the mandate of the FATF, these corrective actions are implemented within the existing framework and through the application of the mechanisms that the FATF currently has at its disposal. Therefore, we anticipate that these actions will not suffice in addressing in a timely manner the most severe harms done to civil society and its operational environment. We also expect that mechanisms such as the country evaluations and follow-up visits to help fix shortcomings in the application of the standards will probably fall short of stopping, say, the dissolution of civil society by governments under the pretext of R8 that we see in some contexts today. This paper will build out our arguments on these statements and provide alternatives that could have positive effects for civil society.

We aim to present the findings of our paper to the FATF Secretariat, its network of regional bodies and select member countries with the aim of discussing meaningful actions the FATF can undertake within the boundaries of its framework in following up on the Unintended Consequences project. Though it is unlikely that the FATF will remove R8 from its standards at the moment, we have nonetheless sensed (from interviews conducted) an interest in exploring such a scenario and what the consequences of that could be. What is spelt out in the paper is whether this would negatively or positively affect the advocacy and engagement of civil society with the FATF and on AML/CFT-related issues.

The findings are presented in distinct chapters from three vantage points: the first looks at **the standard itself** (Chapter 2: 'The Standard: Recommendation 8 Is Not Going to Find You Any Terrorists'), the second at **the national (and regional) impact of the standard** (Chapter 3: 'The National Context: Using a Cannon to Kill a Mosquito') and the third at **the market impact** of the framework (Chapter 4: 'Markets: Markets [Are] Dancing to Another Drumbeat'). Discussion of the various vantage points is preceded by some history to provide background and context and is followed by the presentation of some dilemmas. We conclude the paper with some thoughts on what we think is prudent to leave behind and what to take forward. Throughout the paper, we will address larger questions such as transparency and accountability in relation to both the FATF as well as the particular vantage points we set out.

Methodology

The findings are based on twenty-seven in-depth interviews with representatives of NPOs, the FATF, the World Bank, the International Monetary Fund (IMF), governments, banks, researchers and academics. We also analysed documents, webinars and podcasts produced by the FATF, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms

while Countering Terrorism (hereafter 'Special Rapporteur'), civil-society organizations, think tanks and academics. The questions we set out to address were:

- What would a world without the FATF R8 look like?
- Would it help alleviate the (un)intended consequences of the implementation of this framework for civil society and civic space?
- What does the Global NPO Coalition on FATF and other relevant stakeholders on the issue need to do going forward?

We applied an **evolutionary and revolutionary lens** to our enquiry, including to the interviews and the analysis of documents (a framework that emerged in the interview with C3). The evolutionary lens involved interrogating the state of play and viewing the findings within the existing FATF framework, taking into account the gradual changes made to R8 since 2016. The revolutionary lens looked to reimagine the current status quo, including imagining a world without the recommendation. The focus of both lenses was on the protection of civil society and civic space. Would a step-by-step or a radical change of either the recommendation or the framework support the many challenges facing both civil society and citizens caught up in the web of legislative, regulatory and policy developments set up to combat financial crime? Are gradual or complete and far-reaching changes required to prevent the further securitization of fundamental freedoms stemming from anti-ML and countering the financing of terrorism rules?

Preliminary findings were discussed with core members of the Global NPO Coalition on FATF and presented at an event titled 'Risk and Consequence: The Future of FATF Recommendation 8 for Financial Integrity and for Civil Society' in Bonn, on 26–7 September 2023, which was co-organized by the German government, the Global NPO Coalition on FATF and the EU AML/CFT Global Facility (see Global NPO Coalition on FATF 2023). Over 150 representatives from across the world, including from civil society, the FATF and their regional bodies, financial intelligence units (FIUs), the World Bank, the EU, the UN Counter-Terrorism Committee Executive Directorate, the Special Rapporteur, bankers, governments and regulators took part in the meeting and openly discussed positive developments, pitfalls and future challenges to the risk-based approach to R8.

The final report will be discussed with the larger Coalition membership and the FATF, with an **aim of keeping the task force engaged and committed to avoiding NPO suppression and bank de-risking**.[2] We anticipate the findings will contribute to discussions around the securitization of civic space with the funder of this piece, Funders' Initiative for Civil Society (FICS), as well as with private and public donors who have an interest in preventing the further escalation of security and counterterrorism rules, regulations and action sans any meaningful tackling of the drivers leading to violence (which civil society tries to address in multiple contexts). In the wake of the wars in Ukraine and Gaza, global, regional and national AML/CFT and sanctions regimes have already impacted and continue impacting decisions made by donors and banks about servicing civil society. The last part of this foresight piece spells out further steps the FICS may want to consider in its commitment to address the securitization of civic space.

History and background

Thirty-four years after its inception by the G7, the FATF still remains **one of the 'most powerful organization[s] you've never heard of'** (Tom Keatinge, Royal United Services Institute [RUSI]). An official from the USA once talked about the particularity of 'belonging to FATF land', a territory with insider protocols and rules determined by thirty-nine members comprising OECD countries and two regional bodies, the EU and the Gulf Cooperation Council.

The FATF was originally set up with the mandate to fight financial flows from crime and the drugs trade. Within a few months after the 9/11 attacks, terrorism financing was added to the FATF's mandate (FATF 2019b). Since 2007, the FATF's International Co-operation Review Group (ICRG) has identified, examined and worked with jurisdictions that were failing to adequately implement AML/CFT measures. A jurisdiction that enters this ICRG review process as a result of a disappointing mutual evaluation has twelve months to collaborate with the FATF or its FATF-style regional body

2 'De-risking' refers to financial institutions closing the accounts of clients perceived as high risk for ML or TF abuse.

(FSRB) to address the identified deficiencies and avoid possible public identification and formal review by the FATF. Countries that fail to make progress are included in the list of 'jurisdictions under increased monitoring', also known as the 'grey list'.

A 2021 IMF Working Paper analysing SWIFT transfers found that grey-listing, which occurs when a jurisdiction is placed under increased monitoring due to non-compliance with its standards, results in a 7–10 per cent drop in payment flows to an affected country from the rest of the world (Kida and Paetzold 2021: 4–5).

It must be said that while the FATF has, in the past seven years or so, come out of the shadows slightly, it nonetheless continues to operate largely under the radar. New leadership at the secretariat in Paris and consecutive (vice-)presidents with a more forward-leaning agenda coupled with an appreciation for public communication and outreach have made the work of the task force more visible and, to some extent, more accessible.

In its role as the global watchdog for AML/CFT, the FATF has, since 1989, developed a normative framework for safeguarding global financial integrity and financial inclusion. The framework comprises a set of procedures and standards coupled with a methodology that validates compliance with the standards. The **methodology consists of a continuous cycle of country peer evaluations**, the results of which are measured in ratings which are made public. **Poor ratings immediately impact the international financial standing of a country**, as well-known ratings agencies like Moody's, Fitch and Standard & Poor's include countries that find themselves on the FATF's 'non-compliant' grey list into their high-risk category for investments and trade. Additionally, commercial risk solutions companies such as LexisNexis, Refinitiv/World-Check and Bloomberg incorporate the ratings in the products they offer to private and public organizations for their customer due diligence.

The FATF develops recommendations and guidance for the implementation of the AML/CFT (and, recently, countering proliferation financing, or CPF) standards, allowing governments to design laws, regulations and policies to prevent, mitigate and repress financial crime in the national context. The forty standards cover the entire gamut from preventative measures such as a country risk assessment coupled with outreach to sectors that fall under the scope of the standards for a better understanding of ML and TF risks, to the obligations of governments to comply with the UN targeted financial sanctions relating to the prevention and suppression of terrorism and terrorism financing. TREIN, the FATF training facility in Busan, Korea, provides capacity-building on the standards to government officials. Members of the FATF also invest in training and capacity-building of FIUs to get them up to speed with the recommendations and their transposition to national laws and regulations. Increasingly, a cohort of consultants, often coming out of the FATF or one of the regional bodies, are in the business of building capacity for governments.

The FATF has a methodology for evaluators to assess countries on the uptake of the standards. This **methodology has a technical compliance component**, which checks if countries have the required laws, regulations and structures for standards implementation in place and, more importantly, an **effectiveness component**, which gauges the adequacy, proportionality and efficacy of these laws, regulations and structures. Since 2012, the FATF has been grappling with growing criticism from many, including from some of its own membership and observers, demanding to know whether the standards are effective at all in countering TF or preventing ML.

The FATF methodology is impactful because the ratings coming out of country evaluations are discussed in plenary sessions where countries are called to account in front of their peers. Countries that have performed poorly on the evaluation are given a year to mend the deficiencies found: in most cases, and largely because systemic changes in terms of technical compliance and effectiveness can rarely be effected within twelve months, these countries end up on the FATF's 'grey list' (see Box 1).

Box 1: Criteria for grey-listing	
Condition 1.	The jurisdiction has twenty or more non-compliant or only partially compliant ratings for technical compliance with FATF recommendations;
Condition 2.	It is rated non-compliant or partially compliant on three or more of the so-called 'core' recommendations: 3, 5, 6, 10, 11 and 20; or
Condition 3.	It has a low or moderate level of effectiveness for nine or more of the eleven immediate outcomes (IOs) – key goals that an effective AML framework should achieve – with at least two lows; or
Condition 4.	It has a low level of effectiveness for six or more of the eleven IOs.

Being on the grey list has significant consequences for a country because it has negative economic and reputational impacts, affecting a country's financial sector, its capital inflows and even its receipt of international aid (FATF 2023b) (see empirical research on this, including Kida and Paetzold 2021; de Koker et al. 2023). Countries on the grey list need to develop an action plan, committing to fixing the shortcomings identified, which might include doing a thorough risk assessment or actioning legal, institutional and regulatory reform. The most severe outcome is potentially moving from the grey list to the dreaded 'blacklist'. This happens when a country is deemed to (still) have serious strategic deficiencies and usually no political will to solve these. Apart from reputational damage, this incurs the application of enhanced due diligence by all other jurisdictions, and sanctions (countermeasures) in the most serious cases.[3]

A technical team led by the International Country Review Group of the FATF monitors the progress of a grey-listed country's action plan. Countries often contract ex-FATF or observer members to help them address the deficiencies identified. Countries on the grey list often demonstrate political commitment with many improving and exiting the list within five years (Maslen 2023).

Country evaluations by the FATF are a costly matter. The entire evaluation and follow-up cycle, especially if grey-listed, requires the jurisdiction to expend a significant amount of human and monetary resources. The majority of middle- and low-income countries struggle to find adequate resources. The fact that all countries, irrespective of their vulnerability for ML or TF, have to undergo a similar evaluation process has triggered growing criticism. This resulted in the FATF decision in 2019 to conduct an internal strategic review to 'streamline the FATF's processes to make the next round of mutual evaluations [due to begin in 2025] more targeted, timely and effective' (FATF n.d.e). It was an opportunity for the FATF to look at its forty recommendations on technical compliance and eleven immediate outcomes (IOs) on effectiveness and see whether the framework was still fit for purpose three decades after it had been set up. As one of our interviewees suggested, however, the **strategic review was 'a missed opportunity to throw pieces up in the air and reorder them, to be more flexible**. [The framework] could do with fewer recommendations, more broadly drawn. Or just have the eleven immediate outcomes … What came out, instead, was just an entrenchment of the status quo' (B4). The limited changes focused primarily on 'risk and context to ensure that countries prioritize their efforts in areas where the risks are highest' (FATF 2022c) and, additionally, made the mutual-evaluation cycles slightly shorter.

Reflections about 'imperialism' by FATF members with influence to steer policy decisions that are then downstreamed to regional bodies, especially those for whom financial crimes are not the top priority, have been voiced by persons both inside and outside the task force. It is a public secret that the US delegate to the FATF, the Treasury Department, is most influential in the way the organization directs and leads. This paper will touch upon this issue through providing some context about the internal and external accountability of the group – or, rather, the lack of it – including in how it is funded. The FATF has, to some extent, taken critique about its limited transparency in its stride by improving its external communications via the website and social-media outlets, by including non-profits, fin-techs and others that are impacted by its standards in its yearly Private

3 Three countries are on the FATF blacklist: Democratic People's Republic of Korea, Iran and Myanmar.

Sector Consultative Forum and through the participation of FATF secretariat staff in events organized by the sectors that fall under the standards.

Since 2016, the Global NPO Coalition on FATF has collaborated with the FATF secretariat and some of its presidents in organizing working sessions on the margins of the Private Sector Consultative Forum and the G20/C20 events on both NPO suppression as well as the financial exclusion of civil society stemming from AML/CFT laws. The engagement of the FATF in the past few years with the mandate of the UN Special Rapporteur has given the NPO cause a boost. The mandate's well-documented reports and thorough analyses to which Coalition members have contributed have provided the required independent input at critical moments such as during the Unintended Consequences project.

While these developments are a step in the right direction, the fact remains that the FATF can improve significantly by **sharing draft documents under revision and by inviting representatives of NPOs to FATF and FSRB plenary meetings when issues impacting the sector are discussed** and decisions made about standards that directly concern the sector.

CHAPTER 2

THE STANDARD: 'RECOMMENDATION 8 IS NOT GOING TO FIND YOU ANY TERRORISTS'

Exceptionalism of the sector

The FATF standards cover a wide range of financial services and sectors. However, unlike the others, the non-profit sector was singled out by the FATF and received a recommendation all to itself.[4] R8 specifically addresses the risk of the non-profit sector for TF abuse. This exceptionalism meted out to the sector under the standards, which were hurriedly put in place after 9/11 and added on to the existing standards on ML has, in hindsight, been critiqued by many, including many of those we interviewed. As more than one of our interviewees said, '**If we knew then what we know now, R8 would never have existed**' (D2, D3). Another interviewee, speaking about this exceptionalism, said that 'not every red flag needs its own recommendation … These are risk areas, and should be treated as risk when they are identified as risk' (F2).

Many of our interviewees also noted that it was the activity that was important, and not so much the legal entity, and that '**regulation should be [based] on principle and be vehicle agnostic**' (C1). It was also repeatedly emphasized that while detecting TF it was the patterns of flows that were critical, and an understanding of the nodes in the pattern that facilitate those flows. (A node could potentially be, but very rarely is, an NPO.) As a World Bank paper found, TF activity in NPOs was detected as a result of financial intelligence, not NPO supervisory measures (van der Does de Willebois 2010). **This exceptionalism meted out to the sector meant that NPOs were, as an interviewee pointed out, 'effectively put on the grey list in 2001'** (B4).

Recommendation 8 and Immediate Outcome 10

When R8 was first drafted in 2001, **NPOs were labelled as being 'particularly vulnerable' to TF**, requiring countries to put in place adequate mitigating measures (FATF 2015). From then until this phrasing was amended in 2016, countries were effectively being rewarded by the FATF evaluation system for enacting restrictive measures on their NPO sectors. Countries with stricter laws governing their NPO sectors scored better on their compliance with R8 in the mutual-evaluation process, irrespective of the government's track record on human rights or its respect for fundamental freedoms (including those of association, expression and assembly).

The way R8 was structured at the time meant that, by 2012, countries such as Tunisia and Egypt, both of whom were still under dictatorships, were receiving better scores than a country like Norway. This perverse incentive led to an observable rise in restrictive policies and legislation for NPOs, leading up to or right after an FATF evaluation (Hayes 2012). It **provided internationally sanctioned cover for governments seeking to legitimize a crackdown on critical civil society** in their country. As a result of these types of restrictions, NPOs globally have faced operational and legal restrictions, which has had a negative effect on their abilities to implement activities and to protect the needs of communities, especially in crisis or conflict areas.

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4 Recommendation 8 reads: 'Countries should identify the organisations which fall within the FATF definition of non-profit organisations (NPOs) and assess their terrorist financing risks. Countries should have in place focused, proportionate and risk-based measures, without unduly disrupting or discouraging legitimate NPO activities, in line with the risk-based approach. The purpose of these measures is to protect such NPOs from terrorist financing abuse, including: (a) by terrorist organisations posing as legitimate entities; (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations' (FATF 2023c).

What the long-term effects of this would be on the NPO sector globally, and on human rights and fundamental freedoms more broadly, was not immediately obvious to all involved in writing the standards. However, after more than twenty years, we can see that labelling NPOs as 'particularly vulnerable' to TF abuse has had a lasting impact on the way that NPOs are viewed, for example, by the financial-services sector (more on that in Chapter 3).

To address the criticism the FATF was receiving that their standards were just a tick-box exercise for countries (on whether laws, regulations and institutions to combat ML/TF were in place) and not about whether TF and ML were being combatted effectively, eleven IOs were incorporated into the standards in 2013. These were put in place to assess a country's effective application and enforcement of the laws, regulations and measures put in place to combat threats to a country's financial integrity in terms of ML/TF risk. But, again, there was a sort of exceptionalism meted out to the non-profit sector, with the **weight assigned to NPOs within these IOs being disproportionate**, as an interviewee pointed out (F2).

IO10 relates directly to NPOs, stating: 'Terrorists, terrorist organisations and terrorist financiers are prevented from raising, moving and using funds, and from abusing the NPO sector' (FATF 2023d: 16). As a contrast to this outcome, IO4, for example, covers all financial institutions, all designated non-financial businesses and professions (DNFBPs) and all virtual asset service providers (VASPs). For this reason, perceived ineffectiveness in oversight of the NPO sector under IO10 would have the same consequences as ineffectiveness in a range of vastly different actors under IO4. This may seem technical but matters greatly when it comes to the grey-listing process, as a score of two 'lows' on the IOs could place a country on the grey list (see Box 1 above).

Changes to Recommendation 8

R8 was revised in 2016, after persistent and hard-fought lobbying from the Global NPO Coalition on FATF, resulting in the removal of the long-standing characterization of non-profits in the recommendation as being 'particularly vulnerable' to TF abuse. The **new wording clearly acknowledged that not all NPOs were at risk** and instructed countries to undertake a risk-based approach to regulating the sector so that legitimate charitable activity is not impacted. The recommendation and its interpretative note have been further updated as of November 2023, with clarifications including:

- stating that R8 does not apply to the entire universe of organizations working in the not-for-profit realm but only to those that fall within the (functional) FATF definition of NPOs;
- a reiteration of the imperative for countries to have in place focused, proportionate and risk-based measures to address TF risks identified;
- an acknowledgement of NPO self-regulatory and internal control measures to mitigate TF risks, such that national authorities do not need to take additional measures if these are deemed adequate;
- the fact that NPOs should not be classed as obliged/reporting entities.

(FATF 2023a, 2023c)

Unintended-consequences workstream

The FATF has acknowledged that there have been unintended consequences of the implementation of its financial-integrity framework and set up a workstream in 2021 that scoped out the following four consequences that they would seek to mitigate:

1. de-risking;
2. financial exclusion;
3. suppression of the NPO sector through non-implementation of the risk-based approach under R8;
4. misuse of the FATF standards and mutual evaluations to justify laws that violate wider fundamental human-rights provisions, with a focus on due

process and procedural rights.

The suppression of the sector was the first to be addressed, and this was done through the most recent changes to R8 (FATF 2023c), its interpretative note and the guidance paper on the implementation of R8 (FATF 2023a). De-risking and financial exclusion, including that affecting NPOs, will be addressed in the future, with potentially a change to Recommendation 1 and an updated guidance paper on financial inclusion.

However, the recent revisions to R8 address only one part of the problem that non-profits face: the widely prevalent view in many jurisdictions that all NPOs are risky and conduct illegitimate activities. It does not quite address the other part of the problem: the underlying presumption that all governments are good and well-meaning. To give these revisions more teeth, what is additionally needed are **amendments to the FATF methodology so that egregious cases of suppression, overregulation and de-risking of non-profits can be identified** when countries are assessed periodically – both technically and in terms of effectiveness – on how they are upholding the standards.

Moreover, the **training that the assessors receive** needs to reflect all of the following:

- an understanding of the non-profit sector and how it operates;
- an understanding of states' obligations under various international treaties, especially around fundamental rights and freedoms, international humanitarian law, international human-rights law, and international refugee law;
- an understanding of unintended consequences of the misapplication of the FATF standards and their consequences for the sector and for society at large, including examples of positive and negative practice.

Problem still persists

NPOs, whether peacebuilding, humanitarian, development or human-rights organizations, necessarily work in difficult spaces: in or near conflict zones, within communities that are marginalized or excluded and in areas where the need is the greatest. The work they do contributes to the mitigation of the risk that individuals will be attracted to violent extremist messaging by helping to address the deficit of needs, development and rights at the individual and community level. However, this aspect of the **risk-mitigation work of non-profits is largely ignored when the concept of 'risk' is discussed** in the context of TF and the sector. Despite very limited empirical evidence over the years pointing to the abuse of NPOs for TF purposes, the perception initially created post-9/11 of the sector's immense vulnerability remains.

Although the 2016 language adjustment to R8 was an important and welcome change, in the seven years since, it has been difficult to put the toothpaste back in the tube. Many of these restrictions have already been **codified in national law, and the focus on NPOs as being inherently more vulnerable to TF has trickled down into every facet of the financial-services industry** including, for example, regulator manuals, bank compliance team training programmes and compliance-software algorithms. The tendency overall is still to overregulate the NPO sector. This has resulted in a myriad of consequences, not all of them unintended, documented extensively by the Global NPO Coalition on the FATF and its members and partners, and ranging from burdensome registration, licensing and reporting requirements to issues with financial access, restrictions on receiving foreign funding and restrictions on the freedoms of expression, assembly and association.

Rethinking risk

While the FATF increasingly talks about a risk-based approach in terms of regulation and oversight of the sector for financial integrity, the **conceptualization of this risk is one-dimensional and not holistic** in any way. The risk that ensues when financial-integrity frameworks are implemented in a way that undermines the operational environment of civil society and actually hampers legitimate

charitable activity, which, in many contexts actually helps mitigate the risk of terrorism, is not taken into account. It is, therefore, important to interrogate the 'risk' we speak about in shorthand when we mention or implement the risk-based approach. This will be fleshed out more fully in the chapters to follow.

Conclusion

Given the exceptionalism meted out to the sector under both R8 and IO10 as noted above, the question is whether a **revolutionary approach** is called for in terms of getting rid of the standard altogether. An interviewee (D1) suggested, following on from the logic that not every risk identified needed its own recommendation, that NPOs be assessed as a legal entity under Recommendation 1 (on assessing risk and applying a risk-based approach) and, if there is deemed to be unaddressed TF risk in the sector, to deal with it under Recommendations 24 and 25, with beneficial ownership-style regulatory frameworks. There were plenty of sceptics to the revolutionary approach when dealing with the standard, though, ranging from those who thought that it would be difficult to remove entirely to those who suggested that the harm had already been done (E1) to those on the opposite end who saw value in keeping it, saying that 'removing it will disarm us' (E2).

On the **evolutionary scale**, the recent amendments to R8 and its interpretative note and the revised best practices guidance go some way towards addressing the misinterpretation of the standards and, therefore, the unintended consequences that result from misimplementation. This needs to be further complemented in the future with changes to the FATF methodology and the training of assessors, as outlined above. (This will be further considered in later chapters.) Advocacy around how the IOs are disproportionately weighted should also be discussed. So too should be ensuring that the fourth unintended consequence we have identified, around the human-rights and due-process impacts of the implementation of the standards, is adequately mitigated, including by inserting human rights and fundamental freedom equities within the FATF standards and its methodology and procedures.

CHAPTER 3

THE NATIONAL CONTEXT: 'USING A CANNON TO KILL A MOSQUITO'

Terror trumps all and human rights 'lite'

> *Since 11 September 2001, the UN and various global, regional, and selective institutions, such as FATF, have contributed to steady norm production on counterterrorism, creating a specific 'soft-law ecosystem'. Within these entities, the process of norm production is closed – excluding the role of civil-society actors and human rights experts.*
>
> (European Center for Not-for-Profit Law n.d.a)

Over the past twenty-two years, states have used the standards and guidance created by the FATF to counter terrorism and the financing of it at a national level. Now that these soft-law norms are widely transforming into formal and binding legal frameworks and have been solidified into national systems and laws, they have real-life consequences for people on the ground – particularly for civil society (see also figure 1).

Figure 1 Examples and consequences of overregulation

CONSEQUENCES OF THESE OVERREGULATIONS

- NPOs being shut down
- NPOs having to limit or stop their activities, or shut down the organization altogether
- NPOs having to redirect spending and time to comply with burdensome requirements
- NPOs having to redirect spending from their mission to combatting government allegations
- Reputational damage
- Chilling effect on freedom of association and, consequently, other human rights
- Inability to apply for grants
- Withdrawal of donations from donors
- Chilling effect on humanitarian aid (e.g. donors reluctant to contribute to an NPO after de-risked)

A mapping conducted in 2015 on the various types of overregulation that NPOs encounter resulting from the misinterpretation or misuse of the application of R8 showed that over 150 security-related measures, including TF and anti-ML laws, led to restrictions on the operations and the operating environment of the sector. These included:

- legal provisions that restricted activities or added layers of burdensome requirements, often not applicable to the business sector (UNHRC 2013: para. 24);
- repressive measures against lawful, non-violent activists or groups;
- limiting of access to financial resources or foreign funding;
- governmental smear campaigns with the objective of delegitimizing groups by loosely characterizing them as 'terrorists'.

(European Centre for Not-for-Profit Law, European Foundation Centre and Human Security Collective 2015).

The pervasiveness with which the non-binding recommendations and guidance of the FATF, and especially R8, have penetrated national systems and been able to negatively impact civic space can be attributed to two issues inherent to the FATF standards themselves: (1) the **lack of fundamental rights and freedoms integration in the standards**; and (2) the **exceptionalism that comes with counterterrorism** policies themselves.

First, and as reiterated by the Special Rapporteur, the soft-law ecosystem around counterterrorism was able to develop through a marginalization of human rights (UNHCR 2019b). This is caused not only by the fact that the soft-law norms are produced 'in institutional settings in which the presence and capacity of human rights entities are limited or constrained' but also because 'the nature and form of much of counter-terrorism soft law is highly technical, and its intrusions on rights require distinct, technical and highly specific disaggregation' (UNHRC 2019b: para. 21). In sum, the light 'human-rights footprint', in the form of personnel dedicated to these issues who do not have a human-rights background, which is currently present at the **institutions creating these norms means that they do not have the expertise required to properly analyse or minimize the human-rights consequences** of the implementation of these norms. The Special Rapporteur highlights this with the following example:

> Many of the counter-terrorism standards reviewed by the Special Rapporteur employ a standard phrase, namely, 'in compliance with international law, including human rights, humanitarian and refugee law', which specifies nothing about specific impingements on specific human rights, how they are to be minimized, what law and obligations guide states to that end and what hard or soft human rights norms could guide them.
>
> (UNHRC 2019b: para. 21)

Still, in the absence of hard law, soft-law norms can serve as the sole reference point for years.

Second, there is the exceptionality that applies to counterterrorism measures themselves which appears to trump all else, such as anti-corruption, international humanitarian and human-rights law and privacy rights. When states deploy counterterrorism, they enter a **realm of exceptionality** where 'the normal rules of due process generally do not apply, creating a host of vulnerabilities to further human rights violations. Counterterrorism is an exceptional legal regime accompanied by exceptional national security rules' (UNHRC 2023a: 12). There is a similar perceived hierarchy of priorities between CFT obligations and international human-rights and humanitarian law.

Box 2: Turkey

In its 2019 evaluation of Turkey, the FATF recommended that Turkey 'implement a focused risk-based approach and proportionate risk-mitigation measures to non-profit organizations … identified as at risk of terrorism financing abuse' (FATF 2019a). In response, the Turkish government quickly passed Law No. 7262, which severely restricts the work of civil-society organizations. Among other measures, this law requires government permission to launch online aid campaigns, obliges banks to provide any requested information and allows the minister of the interior to dismiss NPO boards, appoint new trustees or suspend their activities altogether. It also adds an enormous amount of administrative burden to NPO work, requiring yearly audits and having to notify authorities before transferring funds abroad, with heavy penalties when an organization is found to be in breach.[5]

Some would argue that 'the financial approach' is the 'softer' approach to countering terrorism as opposed to the other measures in the counterterrorism toolbox. However, research, news reports (see Hindu Bureau 2023; Berwick 2021; Dobichina 2015; Human Rights Watch 2023; Smit 2023), interviewees, as well as the FATF itself through its Unintended Consequences study (FATF n.d.c) have pointed towards the **cascading negative effects of the wide-ranging and overlapping CFT tools** adopted by states, banks, financial intermediaries and other stakeholders and to the role that the ever-evolving FATF methodology has played in this.

Whether intentionally or not, many stakeholders have erred towards a zero-risk approach to countering TF, often presuming without evidence that the non-profit and charitable sector as a whole is high-risk and adopting undue, disproportionate and discriminatory measures (UNHRC 2023a: 63), while others have gone further and posited that 'by pressuring nations with weak democratic frameworks to adopt and bolster such laws, the FATF has unwittingly handed a new legal instrument to authoritarian governments' (Berwick 2021).

Using the evolutionary and revolutionary lenses, we will now dive deeper into what needs to change in the FATF process, approach and methodology to fix the harms done and to prevent further harms to civil society.

Fighting terrorism: 'Avoiding a bad report' … or worse

The threat of the mutual-evaluation report

The events of 9/11 not only gave impetus to the work of FATF, but FATF's evaluation methodology and public reports gave further momentum to their own work as well. The FATF produces in-depth country evaluations analysing the implementation and effectiveness of measures to combat ML and TF (and, lately, proliferation financing). These mutual-evaluation reports (MERs) are 'strict, and a country is only deemed compliant if it can prove this to the other members. In other words, the onus is on the assessed country to demonstrate that it has an effective framework to protect the financial system from abuse' (FATF n.d.d). Unsurprisingly, therefore, countries attach great value to a positive MER as a poor evaluation can lead to them being placed on a grey list, which, in turn, can directly affect a country's international financial status and creditworthiness. In the words of Angus Berwick, 'a stint on the list keeps a country under close monitoring, potentially unnerving its foreign investors and complicating its overseas banking relationships' (Berwick 2021).

In a recent stocktake analysis of the Unintended Consequences project, the FATF concluded that 'there continue to be countries that incorrectly implement the standards and **justify restrictive legal measures to NPOs in the name of "FATF compliance"**' (FATF 2021: note 55).[6] Interviewees unanimously agreed that the mutual evaluation or its follow-up process is indeed the primary instigator for governments to start ramping up their policies and laws on the NPO sector. 'There are many places where, **when there is an MER follow-up, there is an explosion of new regulations,**

5 FATF (2019: 10, Priority Action [e]). Sources: European Center for Not-for-Profit Law 2021; Global NPO Coalition on FATF (n.d.b); Amnesty International (2021).

6 Some of these cases are highlighted in the boxes: Turkey (Box 2), Zimbabwe (Box 3), Tunisia (Box 4), Nigeria (Box 5), Serbia (Box 6), Israel (Box 7) and Nicaragua (Box 8).

even when they [have] had a sufficient score. They want to show that they are doing something, which trumps all else, including self-regulatory measures' (B1). The default mechanism is wanting to act, even when governments have good relationships with their NPO sector (C4). One interviewee identified grey-listing as the problematic area: 'African countries tend to get grey-listed often. And, according to me, the grey-listing is what is responsible for the restrictions on civil society' (E1).

A common criticism of the FATF framework is, therefore, that it is **predominantly focused on ticking boxes rather than on outcomes** and that it creates incentives that either miss the point or can be used intentionally to meet other government goals (see Boxes 2 and 3 on Turkey and Zimbabwe). In the words of the then FATF executive secretary, David Lewis, in 2019:

> the motivation is generally to avoid a bad report, and the consequences of that, including potential naming and shaming by FATF in the grey or black list, as this increases the costs of doing business in those countries and deters foreign direct investment, as well as affecting their international reputation … The *action is rarely motivated by reducing harm to society* and citizens by following the money that fuels crime and terrorism, or by protecting the integrity of the financial system, or promoting financial inclusion.
>
> (Lewis 2019; emphasis added)

Despite an increased focus on effectiveness over the years by FATF itself, criticism of the FATF and the effectiveness of its evaluation processes remains, as the motivation of global compliance pressures continues to lead to risk assessments that apply arbitrary risk scoring and can arguably be, ultimately, ineffective. Indeed, the FATF country evaluation reports (FATF n.d.a) show that **governments continue to struggle, misapply or clearly lack risk-based measures for the civil-society sector** during these processes. As of October 2023, only seven jurisdictions (Armenia, Bahamas, Bermuda, Hong Kong, Tunisia, UK and Uruguay) were found compliant with R8 (which requires a risk-based approach to addressing TF risks in the non-profit sector).

Box 3: Zimbabwe

In 2023, Zimbabwe passed the Private Voluntary Organisations (PVO) Bill, citing its introduction as a requirement to respond to its obligations in implementing FATF R8. The PVO Bill gives the executive branch wide-ranging discretionary powers over the registration and operations of NPOs (including by compelling them to register as PVOs). The registrar of PVOs has the power to summarily revoke licensing without due process and to remove NPO employees or leadership – again without following due process. By law, PVOs are provided little or no recourse to fighting those decisions. The Bill also gives the executive branch the power to designate any PVO as high-risk for TF abuse, based on an opaque risk-assessment process with no objective criteria. The new Bill contains harsh penalties for administrative offences in registration, including heavy fines and the possibility of imprisonment. Most worryingly, the Bill has provisions that ban NPOs from 'engaging in political activities', a concept that is not defined clearly and could potentially target human-rights work.[7]

7 Sources: International Federation for Human Rights 2023; UNHRC 2021, 2023b; letter from Zimbabwe Lawyers for Human Rights to the FATF, 24 February 2022, https://fatfplatform.org/assets/ZLHR-Follow-up-Letter-to-FATF-on-PVO-Bill-24-2-22-.pdf

Adaptability of the FATF methodology to local contexts and the role of data

Motivation and risk-scoring aside**, the question is whether better compliance leads to effective policy and to preventing attacks** and potential terrorists from abusing the financial system. The FATF has been blamed for measuring 'paper compliance', with no insight into whether it actually addresses the problem of TF (Wesseling and de Goede 2018). Measuring the effectiveness of the FATF framework has, however, proven difficult through its current methodology, assessments and indicators. Some have called the current approach overly legalistic and too focused on sectors. If it were about effectiveness, it would look at patterns of financial flows and the nodes that facilitate this, aggregating data from intelligence agencies and the private sector. But the FATF assessment process as it currently stands does not reflect this. In addition, the FATF has been criticized for whether it can prevent a one-size-fits-all approach, both as it applies to different contexts and to whole sectors, and whether it has the required ability to adapt to different contexts.

'If one goal of FATF is to promote financial integrity while still encouraging financial innovation, that no doubt calls for ensuring that jurisdictions adapt FATF's forty recommendations to their local context. The risk-based approach to AML and CFT in theory helps insulate the regime against one-size fits-all approaches' (Nance 2018: 124). However, as shown above, and as stated by FATF itself, the risk-based approach is not yet an established custom. The **dichotomy in the FATF framework is that universal benchmarks are sought to be applied to vastly different contexts** (E1). And the issue with universal benchmarks is that they can only be implemented if they look the same (B4).

Besides the one-size-fits-all approach as embodied in the global standards, the **lack of a universally-agreed-upon definition of terrorism enables governments to enact repressive laws and to discard due judicial process altogether**. The Saudi Arabian evaluation concluded that 'because of the overly broad definition of terrorism in Saudi Arabia, it is possible that the authorities pursue cases of financing of acts that would not be included in universal counter-terrorism instruments, and as such divert attention and resources to specious cases from more important cases of TF' (FATF 2018).

The Spanish evaluation was positive about the number of trials and convictions, yet Spain received less than the maximum score because the terms of imprisonment being applied in practice 'appeared to be low' (as described in Wesseling and de Goede 2018: 56). Wesseling and de Goede (2018) note that the **FATF measurement of the effective application of TF laws and regulations in terms of the number of convictions coupled with the severity of the penalty says nothing about the quality of the trial** or the prosecutorial due diligence, which, after all, could also lead to acquittals within the rule of law (Wesseling and de Goede 2018). In addition, FATF evaluations often work with anonymized examples and cases taken from national agencies (e.g., FIUs). This leads to telling but generic examples, making it very difficult to determine how representative such cases actually are.

Finally, research by Michael Levi and colleagues comparing FATF evaluations found major differences between evaluation reports in terms of format, areas of concern and the underlying data. They conclude that there is

> still too little reliable data underpinning Mutual Evaluation Reports, and that the system still focuses too much on measuring processes and compliance: claims that countries have less, or more effective systems will be open to allegations that judgements about the effectiveness of their AML and CTF [Countering the Financing of Terrorism] regimes are merely ad hoc, or impressionistic, or even politicized.
>
> (Levi et al. 2018: 325)

Submissions to the 'Global Study on the Impact of Counter-Terrorism on Civil Society and Civic Space' (UNHRC 2023a) complement these findings, stating that **assessors relied upon unverified social-media posts, inputs from government-organized non-governmental organizations (GONGOs) and automated algorithmic assessments** (UNHRC 2023a: 65), the latter referring to the use of bias-prone AI algorithms that seek to predict individual behaviour on the basis of datasets of previous behaviour.

Using the stick of the evaluation reports for the benefit of the non-profit sector

These evaluation efforts, based on inadequate risk assessments lacking relevant data and differing depending on the assembled team of experts and assessors, arguably pose the greatest challenges for civil society within the FATF process. Following this example and the evidence provided by interviewees (D1, B2, E5, E6), **the assessors, their methods and their training is therefore a crucial element in preventing further harms to NPOs and to improving the effectiveness of R8**. As one interviewee noted, if implemented correctly, 'as countries fear the stick of the evaluation reports, that can be used to protect NPOs' (D1). The rest of this chapter dives further into the data-gathering efforts surrounding mutual evaluations, the qualities of the assessors and the outreach to those that can provide the data, more generally, with a focus on changing the FATF methodology around R8 to benefit NPOs (the evolutionary approach).

Box 4: Tunisia

State institutions (including the Tunisian FIU, the General Directorate of Associations and Political Parties at the Presidency of the Government, the National Counter-terrorism Commission) and local NPOs collaborated effectively (2019) to update the risk assessment of the sector. The collaboration, and the work done on implementing R8 in a way that protects civil-society freedoms, has been much valued all round, leading to Tunisia being found compliant with R8 in 2019 – one of only seven countries globally to be rated so. A genuine partnership was built between government and civil society on issues relating to possible TF risks in the NPO sector and measures to be implemented to mitigate these risks.

However, the political situation has changed rapidly in Tunisia in the past few years. There is now less space for civil society, and moves are afoot to amend the (excellent) association law. Another sectoral risk assessment is being planned, and it remains to be seen whether there will be the same level of engagement with civil society as there was in 2019, and whether Tunisia will retain its compliant rating going forward.

Box 5: Nigeria

Nigeria published a national risk assessment for TF and ML (completed in 2016), which identified designated non-financial businesses and institutions (DNFIs), of which NPOs were a subset, as being among those sectors most vulnerable to ML/TF. Spaces for Change, a Global NPO Coalition member, challenged this assessment of risk for the non-profit sector, disputing the official classification of NPOs as DNFIs and teasing out the nuances between vulnerability and threat, among other issues (Spaces for Change 2022). The report led to increased and constructive engagement with the Nigerian FIU and other government and NPO stakeholders, including GIABA (Intergovernmental Action Group Against Money Laundering in West Africa), the FSRB for West Africa. Sustained advocacy from Spaces for Change led to the delisting of NPOs from the DNFI category in May 2022. Further, NPOs have also been engaging in the past year in the ongoing sectoral risk-assessment process.

The 'compliance–industrial complex'[8]

> *Every new regulation. Every new standard. Every new guideline – often created by relying on non-transparent and informal work of technical experts and a range of bodies such as the FATF – translates into the need for staff training, for updated knowledge, or a new software product which too demands training and continuous follow up.*
>
> (Kuldova 2022: 103)

A crucial role in the implementation of the FATF mutual evaluations and assessment of R8 is given to individuals trained on the FATF materials. Before the mutual evaluation takes place, countries train up on what it is they will need to accomplish in an evaluation, and consultants are hired to provide advice on the latest guidance and to prepare the country on what the process will be like. In addition, designated members of the evaluation team (who come from peer countries and sometimes include representatives of the FATF observer bodies) spend a period of eighteen months involved in the evaluation itself (with help from the FATF/FSRB secretariats) (FATF n.d.d): 'The FATF selects the members of the assessment team from a pool of trained assessors. The composition of the team depends on the required expertise for an assessment, including language and legal background. Assessors are appointed by the President, assessed countries do not have a say in the selection'. But **who are the individuals that do the assessments on effectiveness around IO10 pertaining to NPOs** on whether terrorists, terrorist organizations and terrorist financiers are prevented from raising, moving and using funds, and from abusing the NPO sector? And **do their evaluations do justice to the local context of NPOs** and to the differences in the history and operation of the sector between countries?

Those who have engaged with these teams on the ground have expressed that FATF evaluation teams – principally drawn from FATF members, and supported by members of the FATF secretariat – **do not always have sufficient knowledge to assess the risks in the NPO sector**.[9] Depending on the country and the ML/TF risks, additional assessors or assessors with specific expertise may also be required. In selecting the assessors, a number of factors are considered, to ensure that the assessment team has the correct balance of knowledge and skills:

1. their relevant operational and assessment experience;
2. the language of the evaluation;
3. the nature of the legal system (civil law or common law) and institutional framework;
4. the specific characteristics of the jurisdiction (e.g., size and composition of the economy and financial sector, geographical factors, and trading or cultural links).

Assessors should be knowledgeable about the FATF standards and are required to attend an assessor training seminar before they conduct a mutual evaluation. Usually at least one of the assessors should have had previous experience conducting an assessment (FATF 2022b) in the local context. But **assessors are usually lacking in knowledge about civil society** in general and, in particular, do not usually have any background in the sphere of human rights and fundamental freedoms, as illustrated in the following statement by one of our interviewees:

> 90 per cent of the assessors [have] … an AML background, so they get ML, corruption, prosecution, crime, etc. They don't get NPOs, and they need to understand NPOs and civil society to be able to identify and interview

8 This term was coined by Tereza Østbo Kuldova and is explained in her book *Compliance-Industrial Complex: The Operating System of a Pre-crime Society* (2022).

9 From the FATF Procedures document for the fourth round of mutual evaluations: 'An assessment team will usually consist of five to six expert assessors (comprising at least one legal, financial and law enforcement expert' (FATF 2022b: 6)

> them, to understand society through their eyes, to link that to the AML/CFT standards, the gaps, the (possible) harms and challenges and based on that to come up with recommendations and an action plan that makes sense.
>
> (D1)

Assessors' questions are mostly about risks, how finances are managed and what administrative mistakes may have taken place (E6). As another interviewee points out, 'as long as you have measures in place [as a country] there is no human rights or civic space dimension that they [the assessors] pay attention to. If human rights were part of the thinking in the assessment it would be the first thing that they would ask' (E2). In addition, even though it is the job of the assessed country to put representative (including high-risk) NPOs before the assessment team, a lack of understanding of the sector means it is often too much effort for the team of evaluators during the packed on-site visit to seek out and talk to additional experts and civil-society representatives who may not be proposed by the government, leaving little time to delve into the context and content properly.

It is also relevant to highlight the context in which the assessors, experts and consultants who are involved in the advisory services to governments ahead of and around an MER operate. Speaking about the assessors involved in country mutual evaluations, an interviewee noted, 'These are junior-level people who the ministries can let go of for three months on evaluation duty – and jurisdictions use this to train themselves up ahead of an MER' (B5).

Further emphasizing **the world of consultants that has evolved around this compliance industry**, academic Tereza Østbo Kuldova highlights how a transnational community of financial crime fighters and ethical champions has emerged, brought together by training and guidelines such as the FATF: 'Where financial intelligence units remain understaffed, the private sector supplies a growing fleet of experts and shapes the expertise on the subjects' (Kuldova 2022: 103).

The **revolving doors in the financial crime space may also (at least partially) contribute to the lack of positive change** in these assessments, at least when measuring their impact on civil society. The experts involved are actors who have often worked in both the public and private sectors, moving between positions at regulatory agencies, intelligence or as consultants in the Big Four (Kuldova 2022: 156).

So, what could help evolve this political economy of experts and consultants so it actually has a meaningful impact on civil society? First, one could try and advocate for a change in the dynamics of existing teams by **adding someone from the NPO sector or with expertise in the sector as part of FATF country evaluation teams**. This would not only boost the learnings of evaluators on the topic of NPOs and how they work but would also contribute to the level of knowledge about civil society in the teams. Additionally, it would entail the meaningful and sustained inclusion of human rights, gender and fundamental freedom obligation aspects in the mutual evaluation and follow-up processes (UNHRC 2022a: 38) as also proposed by the Special Rapporteur.

Second, assessors urgently require training that includes the fundamental human rights and freedoms guaranteed under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, to which almost all countries are signatories. This could be done through a **targeted training programme on a human-rights-compliant risk-based approach** (including the requirements of legality, proportionality, necessity and non-discrimination under international law) and separate guidance covering the broader considerations concerning international humanitarian law, international human-rights law and international refugee law required in order to implement the FATF recommendations in a way that does not contravene the fulfilment of these imperatives (as proposed by the Special Rapporteur in UNHRC 2022a).

Key to these training programmes will be to teach evaluators **how to get access to NPOs that are knowledgeable and (relatively) independent**. If NPOs are fearful to talk, there needs to be ways in which the assessors can still receive the information they need. Most of all, it is key that these assessment teams are empowered and knowledgeable enough to seek out this kind of information in case governments are proposing a respondent NPO list that is non-representative and cannot fully relay to the assessors the actual situation/operational context on the ground. This content also needs to be included in the training modules offered by TREIN, the FATF training centre.

Finally, there should be **minimum quality standards for assessors**, and this should include an understanding of the fundamental rights and freedoms guaranteed under international law. These quality standards may also include knowledge on analysing quantitative and qualitative data and the verification of information sources when it comes to statements on the NPO sector. Evaluators need to be encouraged to contact civil society as well as academia to obtain an independent view about the country's context (rule of law, human rights, corruption and so forth) and check information provided by the government and the financial professions. 'Most evaluators also look at earlier evaluation reports to guide their own write-ups – that is how practice is formed' (D1). If these reports have well written parts on NPOs in relation to R8 and IO10 and other standards that affect NPOs, then this would generate a significant positive shift.

Where this section focused on the role and qualities of assessors in mitigating negative outcomes for NPOs, the following will focus on the role of the FATF secretariat and the methodology itself in preventing states' 'bad behaviour'.

FATF standards with a human face

Disincentivizing bad behaviour

Those who have engaged with and analysed the FATF system often refer to the fact that to mitigate negative consequences for NPOs, the FATF needs to find a way to not congratulate countries for 'bad behaviour'. As one interviewee puts it, '**the crux [for FATF] is to keep putting up the barriers to disincentivize bad behaviour**' (E3). However, the organization still needs to come up with a mechanism to act properly on this. The recently revised Best Practices paper includes bad examples, i.e. what countries should *not* do when implementing R8 (see FATF 2023a: 19–20).

The FATF itself has suggested that a 'fast evolution' (F1) is needed to walk back from the abuse of the tool and to add an extra layer to mitigate risk. In the interviewee's opinion, evolution is 'simplification and clarification' of language (F1). While the changing of language in the recommendations and methodology so that it includes the 'equities of human rights, humanitarian action, peacebuilding and development' (C3) needs to happen, some argue that adapting language in the FATF documents will not matter all that much. 'Tweaking the wording of Recommendation 8 will not make a big difference. Some governments are looking for opportunities to crack down on CSOs. The nature and scale of that activity will not change by some wording that may alter' (F2).

So what changes do we mean? First, the FATF should amend the evaluation methodology to **penalize overregulation of NPOs more explicitly by including a specific outcome around this in IO10**. This could look at both overregulation (the non-risk-based and overzealous compliance with AML/CFT laws and regulations) and financial exclusion due to overcompliance (Global NPO Coalition on FATF n.d.a). Additionally, in line with this thinking, the score on R8 in the evaluation would then have more weight, and **overregulation would lead to a downgrading in the marking on R8** (E2).

Some interviewees pointed out that the misuse of the FATF standards and mutual evaluations to justify laws that violate wider fundamental human rights, due process and procedural rights provisions received the biggest pushback from the FATF membership during the Unintended Consequences project: 'We saw that where financial exclusion [as a consequence] is more accepted, the due-process stuff is last on the list' (B1), leading to some to call the project 'an opportunity intentionally limited' (B3).

This is attributed by some to the fact that the leads on the FATF are usually ministries of finance or treasuries, who are not typically focused on safeguarding civic space. It is therefore key that there is a coordinated approach across government so that the four pillars of the UN – Peace and Security, Human Rights, Rule of Law and Development – are reflected in the FATF's work. Moreover, the FATF joined the UN Global Counter-Terrorism Coordination Compact in 2022. As one insider expressed,

> Given that FATF is supposed to be an intergovernmental body … then you could say 'you don't just look at AML and CTF but at a range of policies'. Why wouldn't you include the 'human rights position' in the country as part of your position as FATF? Why wouldn't you add words around human rights in standards in relation to NPOs?

(F2)

Another interviewee highlighted that:

> If states followed it [R8] with the same vigour as they do other recommendations, things would be different. But they cherry-pick. Governments make trade-offs. Protecting the TF and sanctions equities is more important than it is to provide an enabling environment for humanitarian activity. [We need to] start ensuring that the letter of Recommendation 8 is respected. There is an imbalance in how it is currently implemented.

(G1)

Second, **interviewees note that it would help if the FATF more explicitly called out the damage that R8 has done** because governments would then have to align with this new advice and be pushed to amend overregulation. One interviewee stated, 'In our case, there was engagement from other stakeholders like the IMF and the World Bank, but if FATF [had] expressed its concerns we do think it would have helped' (E3).

The FATF can add weight to statements made by staff at human-rights, humanitarian and development mandates, even though FATF is not a human-rights body itself. At the start of the COVID-19 pandemic, the statement put out by the FATF (FATF 2020) about the importance of not disrupting financial transactions of legitimate charities was widely welcomed. As a government interviewee said:

> Look at the utility of R8 (as opposed to its negative impacts): the presidential statements released – especially the one during COVID, which laid out what the standards are intended to do and what they are not intended to do – especially around legitimate NPO activity … We used language from the statement in our government policy. [It] shows that international standards are taken seriously. The question, of course, is whether you need R8 in order for the FATF president to make such statements.

(G1)

Overall, the sentiment is that due to statements by FATF in the past, most countries can no longer 'get away with over-implementing R8 as they used to' (D1). A case in point is Turkey, which was grey-listed and had its implementation of R8 and IO10 criticized by the FATF (see Box 2). The official statement by the FATF was an entry point to discuss corrective measures for the disproportionate regulation of the sector, and here R8 proved to be a lever that enabled this discussion.

More generally, the action of regional bodies and the FATF is key here to create protection, if they emphasize that 'you can't just use this recommendation to slash critical voices' (E6). However, the FATF has to be 'more explicit about this and react sooner when abuse is detected/flagged' (E6).

The FATF response

What can the FATF do within the current methodology to call out damage and bad behaviour? First, it must ensure closer collaboration between NPOs and the FATF secretariat to come up with an **early-warning and early-response mechanism** for receiving communications before any laws and measures are adopted that hamper legitimate NPO activity. Facilitating the transfer of such information, with adequate privacy protections, to assessors and the FSRBs, needs to be part of such a mechanism (UNHRC 2022a). Many interviewees have sent letters to the FATF but note that their engagement is not like that with the UN Special Procedures mandates, where you can follow up and meet. An interviewee illustrates:

> I had support from the Global NPO Coalition on FATF, the ICNL [International Centre for Not-for-profit Law], the ECNL [European Center for Not-for-Profit Law], UN Special Procedures. We wrote to the FATF two times [about overregulation in our country]. And then in an in-person meeting they said they have no power to do anything and redirected me to the UN human-rights mechanisms. The FATF needs to come up with a mechanism to act properly in these situations.
>
> (E3)

Second, there needs to be a way in which FATF can create transparency around the country context beyond the technical AML/CFT aspects. As an interviewee put it, 'From a technical and methodological perspective, it is difficult to bring that kind of information out at the moment. We almost need to find an excuse. A common way is now to reference this in the beginning of a report where you set out country context and materiality' (F2). However, there are currently constraints on how this detail is provided and referenced. For example:

> [In] a country that is a member of the Gulf Cooperation Council,[10] there are more terrorist financing convictions than the rest of the world, but there is no right to fair trial. How would we avoid congratulating them for tackling terrorist financing while they are locking up teachers? All you can do now is mention it in the context of the country in the reports.
>
> (F2)

Cross-country thematic reviews as part of a benchmarking exercise could be a way forward, as they would also require governments to respond to them. Public allegations of abuse – including NPO suppression, de-risking and disproportionate regulation – could be more easily entered into a thematic report than in a country evaluation. At the moment, civil-society letters for the assessment teams often 'never see the light of day' while 'it is still not the job of FATF to validate if allegations are true' (F2).

> Behind closed doors, we would say that there is an abuse of laws. And our focus was, and is, 'How do we bring this out in the report?' From a methodological perspective, it is difficult to bring that kind of information out now. We almost need to find an excuse. Instead of looking at everything, you could look at specific topics across all countries and publish that. This is more powerful and puts pressure on countries when they become part of a benchmark report: It would force them to respond.
>
> (F2)

Third, there needs to be a **bigger role for regional FATF bodies in issuing statements** as some argue that they have not done enough to prevent the enactment of 'very bad laws'. As these bodies are most in contact with national institutions, they have a larger role to play in calling out overregulation and worse. There have been criticisms of regional bodies not responding to NPO concerns (E3). GAFILAT (El Grupo de Acción Financiera de Latinoamérica; Latin America Anti-Money Laundering Group), for example, has started to collaborate with the Global NPO Coalition on FATF and now provides civil-society members formal space during its plenary meetings (ICNL 2021). However, this does not always lead them to taking a stance that can have an impact. As an interviewee noted, 'They are political bodies at the end of the day: they call themselves technocratic, but this is not true. They are super cautious in terms of any statements against governments' (E4).

10 The Gulf Cooperation Council is a member of the FATF.

Box 6: Serbia

In 2020, the Serbian FIU, the Administration for the Prevention of Money Laundering, requested Serbian commercial banks to provide the information and documentation concerning the accounts and financial transactions of fifty-seven NPOs and individuals, including human-rights and humanitarian organizations and journalists. The stated legal basis for these demands was Serbia's Article 73 of the Law on the Prevention of Money Laundering and the Financing of Terrorism, which allows such a request to be made if there are grounds for suspicion of TF or ML.

Serbian NPOs, with the support of international allies, immediately took action and sounded the alarm bell. UN special rapporteurs published a letter saying that 'the unjustified use of this law risks intimidating civil-society actors and human rights defenders, restricting their work and muffling any criticism of the government' (UNHRC 2020). In response to the special rapporteurs' letter, the FATF reiterated that it was 'in direct contradiction to the FATF Standards and categorically unacceptable if its measures are exploited and used to oppress human rights under the pretext of counter-terrorism. Should this be identified in the course of a mutual evaluation, a country would be assessed negatively for not implementing the risk-based approach outlined in the FATF's Standards.'[11]

The FATF directed the regional body MONEYVAL (the Council of Europe Anti-Money Laundering Group) to monitor the situation. MONEYVAL released a statement after its July 2021 plenary recalling 'the specific limitations contained in the FATF Recommendations and Methodology with regard to the powers of the FIU to seek information from reporting entities so as to avoid indiscriminate requests without a link to a suspicion of money laundering (ML), terrorism financing (TF) or predicate offences' (Council of Europe 2021: 3–4). An interviewee noted that the combination of interventions (UN Special Procedures, FATF and MONEYVAL) led to action and concrete results.

Box 7: Israel

In October 2021, Israel designated as terrorist organizations six well-known Palestinian human-rights and humanitarian organizations using the implementation of FATF R8 as a pretext. The EU, UN agencies and others said there was no evidence and therefore no basis for designating the six as 'terrorist organizations' (e.g., UNHRC 2022b). While the matter was being raised with the FATF, the somewhat disappointing response received (under the German presidency) was that 'The FATF is not in a position to assess or express an opinion on domestic measures of one of its members outside the regular evaluation process and can therefore not express a view on the matter you have raised'.[12]

While the FATF found it acceptable to make a statement on Serbia (Box 6), even though it was outside the mutual-evaluation cycle, it tellingly chose not to do so in the case of Israel (Box 7). So, much as the **FATF likes to portray itself as a technical body, some countries are clearly more equal than others, with geopolitical considerations the elephant in the room**.

11 Letter from the president of the FATF, Dr Marcus Pleyer, to Professor Ní Aoláin, Mr Voule and Professor Lawlor, 18 December 2020, p. 4, https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=35813

12 Letter from FATF executive secretary, David Lewis, to Ms Lia van Broekhoven and Ms Kay Guinane, co-chairs of the Global NPO Coalition on FATF, 30 November 2021, https://fatfplatform.org/assets/Letter-from-FATF-Executive-Secretary-to-Global-NPO-Coalition-+EAM-002.pdf

Building FATF expertise and capacity

As the FATF itself states, it is not a human-rights organization. This means that it is often not aware of pressing human-rights issues in a region or country. While the FATF refers to international human-rights law in its discussions about R8, this does not mean that FATF staff or assessors understand the specific breaches of human rights, how these can be curtailed and what law and obligations guide states on human rights. The new Best Practices paper, for example, states that

> Complying with the FATF Recommendations should not contravene a country's obligations under the Charter of the United Nations, and international law, in particular, international human-rights law, international refugee law and international humanitarian law. ... Implementation of R.8 should respect and observe fundamental human rights and freedoms, such as freedom of opinion, expression, religion or belief, and freedom of peaceful assembly and of association.
>
> (FATF 2023a)

But what does this look like in practice when implementing the FATF recommendations? It **would help if the FATF had actual rights and freedoms expertise on the team**. Some of our interviewees have proposed a FATF dictionary clarifying these terms within the FATF context and its processes (E6). One way to gain this expertise is to seek support where it matters and to strengthen relationships with other entities that do have this expertise. Across the board, interviewees have shared that if the FATF engaged with the right stakeholders, they could play an important role in the curtailment of human-rights abuses. As one interviewee said, 'Take broader human rights such as privacy: I just don't know if it's going to have its day at the FATF or if we need to find ways to strengthen the relationship between the FATF and other entities to bring these to their attention' (B1).

Formalizing relationships with existing human-rights bodies such as the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association could be one way of doing so. **On-site visits for human-rights monitoring could then take place in conjunction with TF country visits**, which could lead to informal discussions with monitoring bodies to share experiences. One interviewee told us that the conversations which would then take place among stakeholders would be different. For example: 'Our team finds this, let us share that. How is the team preparing for the visit? You must speak to Person X from the OECD who did a recent visit, etc.' (F2).

In addition, and as flagged many times before by NPOs and the Global NPO Coalition on FATF, **meaningful engagement with NPOs** throughout the mutual-evaluation cycle is key. **Making a participatory (sectoral) risk assessment mandatory** could be a way forward in this regard because 'if it's not mandatory the government doesn't really invite you into the process' (E5). The sectoral risk assessment is key to getting implementation of R8 right, and the FATF needs to make it incumbent on the jurisdiction to meaningfully engage a wide representation of civil society in the process. The sector usually knows itself best – and can help the jurisdiction understand the sector operational context, the self-regulation measures in place and any residual gaps it perceives in terms of TF risk. A participatory approach like this will always be more robust and likely prevent the kinds of overregulation we witness regularly today.

The FATF has sometimes facilitated direct input from civil-society organizations to the mutual-evaluation assessment team. Indeed, in the Latin American region, for example, GAFILAT appears to now be paying more attention because of what happened in Nicaragua (Box 8): 'There is a window that they [in other Latin American countries] are now using to share evidence on NPOs. This is good, but it's not enough. **CSOs need space to interact with evaluators**, explain the context and once they have that understanding to work together to prevent bad regulations' (E4).

Box 8: Nicaragua

Since the government crackdown on civil society stepped into high gear in 2018, almost all of the country's organized opposition has now either been jailed or exiled. The government used new legislation, supposedly aimed at preventing TF and ML, to outlaw or close down more than 3,000 civic groups and NPOs, including those focused on human rights, democracy and citizen participation. The issue was raised by UN Special Procedures and by NPOs with the FATF, who in turn raised it with the regional body, GAFILAT. The situation was discussed in the GAFILAT plenary meeting in July 2022. However, Nicaragua was removed from the FATF grey list in October 2022, which means it is now no longer subject to increased monitoring. This has led to disappointment in the NPO sector that Nicaragua has seemingly got away with their actions, though the FATF did note in its decision to delist the country that 'the FATF is strongly concerned by the potential misapplication of the FATF Standards resulting in the suppression of Nicaragua's non-profit sector. Nicaragua should continue to work with GAFILAT to improve further its AML/CFT regime, including by ensuring its oversight of NPOs is risk-based and in line with the FATF Standards' (FATF 2022a).

The ghost of Recommendation 8 will remain

> *Countries have tasted the power provided to them by R8. It gives them the legal impetus to do things that otherwise would have been branded 'draconian' or 'authoritarian'. It gives these countries the licence.*
>
> (E1)

Over the years, the FATF has adapted its communication, guidance and R8 itself with the goal of limiting negative impacts on civil society. However, more than twenty years later, there is still ample evidence (Berwick 2021) **that these measures continue to have negative impact for the civil-society sector and for human rights, 'through poor design or intentional misuse'** (European Centre for Not-for-Profit Law n.d.b). The use of the 'NPOs as high-risk' narrative continues not only at the international but also particularly at the national level.

At the national level, these measures have in some cases been solidified into national law, meaning that even if the narrative were to change at the international level, the impact at national level will be slow to follow. The boxes throughout this chapter have presented a picture of national laws which have been adapted to comply with CFT standards. There is both an overt and implied role of R8 in these adaptations. Sometimes R8 is explicitly mentioned by countries in their adapted legislation, but at other times it is trickier to determine the causal link. In a country's search for what to do 'to get a good mark', it sometimes copies the CFT or NPO law of a neighbouring country, as we have seen in the cases of Venezuela and Guatemala. But the fact that the existence of R8 has played a role in this is clear.

While interviewees across the board have generally agreed that it would have been better if R8 had never existed in the first place, would civil society be better off today if R8 were to be removed? In other words, is the revolutionary approach the best way to go? Some of our interviewees were of the opinion that, **in some countries today, it would matter a lot if R8 were to be removed**, particularly considering the message this will send from the FATF that the exceptionalism meted out to the sector in terms of potential TF abuse is not merited and that it can be treated as just another legal entity and its risks assessed accordingly. For civil-society groups in countries such as El Salvador and Guatemala, for example, where there is space to influence the government to withdraw certain regulations, the impact of getting rid of R8 was perceived to be substantial.

However, interviewees also suggested that in those many countries where the damage had already been done, the removal of R8 would not matter that much anymore because **laws inspired by R8 have already been enacted and implemented**. Countries have already used the excuse of security policy to clamp down on civil society so they do not necessarily need the argument of R8.

This is accompanied by the fact that it is not just R8 that has been misused but also other recommendations. '**If we're looking at an overhaul, we need to look at it from a more holistic manner than just R8. This is just one tool in the arsenal'** (C2).

Most importantly, many have realized that even if R8 were to be deleted, '**the ghost of R8 will remain and still influence thinking going ahead**' (B3). This is exemplified by the fact that even after its first revision in 2016, the number of states that still do not understand what the revision was trying to get at is rampant. 'Even some of the UN entities working in this space don't really get it' (B1) one person observed, as we heard of examples of UN trainings on CFT that still use the pre-2016 version of R8 and therefore do not incorporate the risk-based approach and the FATF's clear position that '[n]ot all NPOs are high-risk and some may represent little or no risk at all' (B1).

What exacerbates the situation at the national level is the lack of agreement on a universal definition of terrorism. 'We are trying to contain a monster that we have created; every country is interpreting terrorism at their own convenience and FATF is [only] part of the problem' (E4). Importantly, in assessing the value of removing R8, it is important to realize that although R8 was a crucial driving force in creating operational difficulties for NPOs, **on the international level there is now a vast system of laws and policies that present challenges to NPOs that is not limited to the FATF**. There are CFT/AML provisions impacting NPOs disbursed in many different international mechanisms, including sanctions and UN Security Council resolutions. These same mechanisms, although not always directly targeting NPOs, have a clear impact on their operational space.

Finally, R8 seems to have provided a hook for engagement, sometimes leading to meaningful dialogue with governments and thereby becoming a tool for damage control. As an interviewee put it, '**It would mean giving up what we fought so hard for: the nuanced guidance on the exceptionalism of the sector**. It … [would be] difficult to integrate the nuanced language on NPOs in Recommendation 1' (B5). Another person added,

> The danger I see is that it has existed so long, that there is now a structure for engagement and to address overregulation. It has framed protection against abusive regulation: we don't wish to lose this in country specific contexts. Recommendation 8 could potentially be a regulated policy that is now fine-tuned in a way that would be a tool for damage control.
>
> (C4)

Conclusion

This chapter has highlighted the complex 'soft-law ecosystem' that the FATF has created around counterterrorism which is often implemented without the relevant expertise around protecting civic space or humanitarian efforts. Indeed, it is the evaluation efforts that are based on inadequate risk assessments, that lack relevant data and that differ depending on the teams of assessors, that pose a serious issue for civil society in the FATF process.

This chapter has posed a few actions that FATF could take forward to resolve this issue such as adding someone from the NPO sector to the assessment teams, a targeted training programme on a human-rights-compliant risk-based approach (including the requirements of legality, proportionality, necessity and non-discrimination under international law) and minimum quality standards for assessors which include an understanding of the fundamental rights and freedoms guaranteed under international law.

In addition, to prevent that action by states is incentivized by a fear of getting a bad report rather than by reducing harm to society, the FATF could create cross-country thematic reviews as part of a benchmarking exercise, formalize relationships with existing human-rights bodies, both generally and during on-site visits, and come up with an early-warning-and-response mechanism for receiving communications before any laws and measures are adopted that hamper NPOs.

We are thus left with the question of whether the removal of R8 would be the best way forward? The FATF has arguably come around to caring about the consequences of R8 and has already improved part of its mechanisms to engage with civil society to get at least some of the facts and

context on the table. There thus exists a fear that **the removal of R8 would remove any pressure that exists on the FATF to continue engaging** on the topic of NPOs. This brings us to the conclusion that removing R8 at this moment, while theoretically appealing, is pragmatically not quite convincing and might potentially even be counterproductive (B1). However, if, in a couple of years, after monitoring the implementation of the revised R8 in the fifth round of evaluations, there is still widespread overregulation and suppression of the sector, hampering its development, humanitarian, human-rights and peacebuilding mandate, then there will be a strong argument for its removal after all.

CHAPTER 4

MARKETS: 'MARKETS [ARE] DANCING TO ANOTHER DRUMBEAT'

Banks and financial exclusion

While the normative standards around TF, ML and proliferation financing are set at the international level, implementation of these takes place at the national level, with states interpreting the norms and giving them life through law and regulation. The other crucial aspect of this at the national level is the market, which is at the coalface of having to help operationalize the rules and regulations. This **includes banks, who have been made gatekeepers** in terms of upholding financial integrity. But it is not just the banks. As the previous chapter introduced, **a whole political economy has arisen around the regulatory imperative of financial integrity**, whether that is companies who provide 'risk solutions' to banks and others, or consultants who help disseminate the regulatory framework. This chapter will interrogate what these issues of 'securitization' and 'risk' entail from the vantage point of this political economy and, in particular, what they mean for entities like banks and, more importantly, for NPOs in everyday practice.

Figure 2 Examples and consequences of de-risking by banks

CONSEQUENCES FOR NPOS

- Reduced ability to raise funds from donors
- Resorting to informal financial sector or transferring funds through less secure channels
- Reducing humanitarian aid funding
- Forcing civil society activity underground and delegitimizing civil society work
- Higher transaction costs for cross-border transactions
- Withdrawal of donations from donors subject to enhanced due diligence
- Inability to provide humanitarian funding to conflict-affected areas
- Delay of life-saving humanitarian assistance in conflict-affected areas
- Inability to operate in or transfer funds to conflict-affected areas
- Increased risks of transferring money via informal channels
- Chilling effect on freedom of association and, consequently, other human rights
- Chilling effect on humanitarian aid (e.g. donors reluctant to contribute to an NPO after de-risked)

'Risk' and its downstreaming'

'Banks were effectively put on the grey list.'
(B4).

The mantra over the past two decades and more has been one of financial integrity at all costs when it comes to combating TF. This was of a piece with the general environment post-9/11, with the security discourse at the multilateral level seeing a shift from the founding principles of peace, development and human rights in the UN Charter to one that was firmly tethered to terrorism. This conflation of security with the risk of terrorism then cascaded down to the national level. In both arenas, what we see is the focus on (and the funding of) counterterrorism and countering the financing of terrorism trumping all other paths to peace and security.

This securitized discourse has had a lasting impact not only on how society is viewed and managed but also on how risk is perceived and dealt with. The terrorism (and therefore TF) threat is perceived to be all-pervasive, and therefore organizations (whether these are financial institutions or NPOs) are seen as vulnerable to being exploited. This presents a risk, and the consequences of that risk coming to pass then need to be mitigated.

Banks are placed at the front line, tasked with combating the risk of TF (apart from being tasked with policing ML, proliferation financing and other illicit financial flows). The problem with this is manifold. First, as academic Tereza Østbo Kuldova succinctly pointed out, this is a method of 'governance by proxy' (2022: 35). **By downstreaming the management of risk to private actors such as banks, governments are getting away with trying 'to fix social, political and economic problems through technical fixes'** (Kuldova 2022: 108). Instead of tackling the proximal causes that lead to terrorism (and therefore TF), governments (largely Western ones) have chosen to frame and make 'pressing global crime and security issues … to a large degree a techno bureaucratic matter of compliance, risk and threat management, accounting, auditing, intelligence gathering, and reporting' (Kuldova 2022: 5). The manifestation of this is through what many have termed a 'regulatory capitalism' framework, exemplified by none other than the likes of the FATF standards and its implementation.

Not only are the root causes of the issues pertaining to terrorism (and TF) not sufficiently addressed by governments, but also what is sought to be addressed in terms of combating TF is largely delegated to the private sector – in this case, the banks. As Kuldova puts it, we live in an era where 'the social and political' have been reduced 'to quantified indicators, rankings, benchmarks, standardization, perpetual assessments, and other feats of managerial engineering' (2022: 37).

The FATF mutual-evaluation process and its implementation, which is largely technical in nature, is one such reduction, and, though countries are also judged on outcomes (whether they have managed to tackle TF or ML through these technical fixes), **the effectiveness of the system as a whole to stop TF has never been definitively proven**. This led one of our interviewees to comment that a system that had made the private sector a gatekeeper in this matter meant that 'Banks were effectively put on the grey list' (B4). More importantly, while countries on the grey list have a chance to fix their deficiencies and come out of the list, for banks, their gatekeeping role was a sentence for life (or at least till the framework itself is overhauled completely).

Banks, and the role they did not ask for

This gatekeeping role of banks is at odds with their function as commercial, profit-making entities. Recent estimates suggest that the foisting of the gatekeeping role onto banks has meant **that almost one in five employees is now working on compliance** – performing Know Your Customer (KYC) or due-diligence checks. The costs of this run into the hundreds of millions, something that is not subsidized by the government (for whom the bank is performing this policing role).[13]

Then there is the **question of effectiveness**. Given that a terrorist financier or money launderer will likely make use of multiple banks and multiple financial constructions, a bank really only has a part of the picture at any given time – certainly not enough to effectively detect financial crime merely

13 A study by McKinsey & Company for the Dutch Payments Association (McKinsey & Company 2021) found that KYC cheques cost banks in The Netherlands almost €565 million a year.

through transaction monitoring. And, while public–private partnerships (PPPs) are often cited as a cure-all for this, as one of our interviewees noted (B2), the reversal of information that PPPs entail (so from FIU or law enforcement to bank, instead of the other way round while filing suspicious transaction reports) 'seems dangerous when there are not enough safeguards', and this includes the basic gateway right of privacy.

The same interviewee noted that while PPPs are more targeted, 'the fact is that these partnerships are added on, they are not used to take something away from the existing systems' (B2). This bolting on creates a layering effect: **rules and regulations (related to the compliance function, for example) are only ever added to, and never taken away** when an ostensibly more efficient system such as PPPs is put in place. This adds to the burden of the institution in the guise of bringing about more effectiveness, which is, anyway, a moot point with PPPs, as the interviewee noted.

Banks and non-profit organizations: the fallibility of the risk-based approach

> *'The risk-based approach is too sophisticated for the global market. We need a rule-based approach for everyone, and a risk-based approach for the big players.'*
>
> (B3)

The past two decades and more have seen a damaging discourse, without much empirical evidence, that the non-profit sector as a whole is at high risk of being abused for TF, leading to a slew of unintended (and intended) consequences such as NPO suppression and financial exclusion and bank de-risking. Much of this **damaging discourse on the non-profit sector** (some of which is being sought to be corrected at the normative level) **has been hardwired into the market**, whether that is with companies who create risk profiles to sell on to financial institutions or within financial institutions themselves through their compliance and due-diligence functions. For banks, who have been made gatekeepers in terms of upholding financial integrity, non-profits are low-hanging fruit when it comes to the 'financial integrity at all cost' slogan. Varied in size and mandate, and with varied operations, often across borders, **the sector is not monolithic, making it difficult to comprehend for compliance teams and easier to de-risk** after taking into account the complexities of due diligence balanced against the potential profit that a non-profit customer might accrue for the bank. All of this is compounded by the **lack of proper guidance and robust risk-based assessments** of the sector from the government and the banking regulators, who are only too happy to pass the buck on to the banks.

This downstreaming of risk has led to a risk-averse culture when it comes to non-profit financial access, sometimes forcing non-profits to use informal and other means to carry out their important and life-saving mandates – to the detriment of the financial-integrity norms that they would actually much prefer to uphold.

Underpinning the FATF framework is the risk-based approach: that regulation and oversight should be proportional to the financial-integrity risk. But, as one of our interviewees said, the **'risk-based approach is too sophisticated for the global market'** (B3). The government will often assess the risk of the non-profit sector for TF abuse, either in the national risk assessment or through a separate sectoral risk assessment. This alone, however, is not enough for financial institutions. While they may take their cue from it, banks end up doing their own risk assessments for onboarding NPO customers as well as for making transfers. This calculation for the bank involves due-diligence cost and risk appetite, as well as reputational concern.

Non-profits often do much of their work in difficult contexts – in conflict zones or in sanctioned countries. And banks not only have to consider TF when they conduct a risk assessment but also have to be cognizant of sanctions regimes, of which there is now a proliferation (there are whole countries, companies and individuals on lists), whether multilateral or unilateral. As one banker told us, **'small organizations are "bleeders" for banks … and while rejecting [their onboarding or transfer request], we cite the [TF law] and not the cost'** (A3).

The conceptualization of 'risk' per se is also extremely one-dimensional, reflecting only the potential TF risk to the state. It does not take into account the multitudes of other risks that stem from this blinkered perspective – the risk, for example, of an overly securitized approach (including the misuse and abuse of the financial-integrity frameworks by governments) hampering legitimate

charitable activity, whose work through humanitarianism, development, human rights and peacebuilding often includes the mitigating of that very terrorism risk. It is important to ask 'what risk' and 'whose risk' we are considering when we speak about the risk-based approach and what we miss when risk is not thought about holistically.

This led an interviewee to say that what we needed, in effect, was **'a rule-based approach for everyone, and a risk-based approach for the big players'** (B3). The risk-based approach was deemed inappropriate for smaller regulated institutions, for example, not only for being too resource-intensive but also for the underlying assumption made that industry as a whole (the market, i.e. the regulated) would all be better at identifying and managing risk than the regulators/supervisors. A rule-based approach, said this interviewee, would not be without risk consideration, but the identification and calibration of that would lie with the regulator (B3).

The Netherlands has recently initiated such a move aimed at recalibration. The Dutch Banking Association (NVB), supported by the Central Bank (the supervisor) and the Ministry of Finance (the legislator), has come up with a set of sector baselines for NPOs (NVB 2023b) following on from the Risk-Based Industry Baselines (NVB 2023a) published earlier in 2023 for banks and customers. The baselines set out clear principles for the risk-based application of the open standards in the Money Laundering and Terrorist Financing (Prevention) Act in customer due diligence by banks. The sector baselines on NPOs are more granular for and on NPOs, and add to the generic baselines. Banks are initially meant to see NPOs as neutral (as opposed to before, when the entire sector was seen as high-risk for TF) and would then apply a risk lens to do 'more if necessary, less if possible' in terms of due diligence (NVB 2023b: 2).

Multi-stakeholder dialogue

These developments have come out of a multi-stakeholder dialogue process, of which the Human Security Collective (HSC) is a part. The HSC also co-convenes (with the Ministry of Finance and the NVB) the Dutch Roundtable on Financial Access for NPOs, which was established in 2017 to address issues related to de-risking by banks and payment service providers that have made it difficult for NPOs to access financial services. The **round table brings together key stakeholders to promote financial inclusion for NPOs** and ensure that they can continue to carry out their important work. One of the practical solutions that the round table has led to is the creation of a portal for NPOs by ABN-AMRO bank, in collaboration with HSC and others (see ABN-AMRO n.d.). The portal helps NPOs understand their risks as perceived by the bank, thereby facilitating onboarding and transfer processes from a due-diligence perspective.

Such multi-stakeholder dialogue processes are oftentimes the only way to solve the seemingly intractable problem of NPO financial exclusion. Involving civil society, banks, government, financial intelligence, regulators, supervisors and banking associations, versions of these dialogue processes are taking place in a few contexts now, with varying results (van Broekhoven and Goswami 2022).

Political economy

The offloading of risk and risk calibration to the private sector has seen a rise in many ancillary markets. This includes companies that provide financial-crime risk-management solutions for banks and others. Financial-crime intelligence is gathered from open-source reports and data, and that data is crunched using AI to create databases with risk indicators. These **databases amplify existing biases regarding the non-profit sector** and sometimes reinforce questionable open-source material/reporting. Additionally, there is the growth of the financial and regulatory technology (fin-tech and reg-tech) industries that seek to help banks with their compliance function as well as with transaction monitoring, using big data, machine learning and blockchain technologies. As Kuldova notes, this is a world 'where knowledge takes the form of updated best practices responding to "evolving risks and threats" and the rapidly changing regulatory landscape, often combined with a sales pitch for software or consultancy services' (2022: 101). A recent report (Soares et al. 2022) seeks to explain how the design, development and deployment of these technologies could impact NPO financial inclusion.

The final layer to the political economy surrounding the topic, which was also touched upon in the previous chapter, includes the proliferation of technical-assistance providers who are helping

governments, for example, to carry out risk assessments or implement the financial-integrity framework. There are **no quality standards that apply to these 'advisers'**, and when it comes to NPOs, these consultants often have very little insight on how the sector operates or around some of the other policy obligations a country has, such as its human-rights obligations or, indeed, its humanitarian law imperatives.

Markets and other drumbeats

A banker we interviewed told us that while the **FATF R8 framework on NPOs and potential TF risk might be 'an element for risk determination by banks of NPO customers … [it is] not significant'** (A2). For their bank, 'commercial considerations and reputational risks determine whether they provide services to the customers' (A2). Moreover, the change to the standard itself in terms of clarifying the language around the risk-based approach was thought to be less relevant for a 'workable risk framework for NPOs' (A2) given the multitude of considerations for the bank, not least including national laws and regulations, and the sanctions context. In that sense, this banker said, a multi-stakeholder dialogue process is more useful for raising awareness and gaining a nuanced understanding of risk in the sector.

Another interviewee (B3) pointed out that '**institutions are better at ratcheting up** (look at Russia sanctions) **than winding down in terms of positive relaxations** … They don't reflect the ability to recalibrate and relax their controls based on new information', adding that '**guidance issued by FATF is hardly read by industry**'. All this points to the fact that normative change in the right direction for NPOs, as is happening now at the FATF level, while welcome, is not a panacea. The market is in thrall to other drumbeats, whether that is their 'legalistic thinking' (A5) in terms of liability avoidance, their commercial imperatives or, indeed, their reputation. As an interviewee put it, while banks might be well-meaning in themselves, 'so much is hidden and interpreted and provided to the market that shields the market to what the FATF is saying' (B3). A recommendation that was made by the interviewee to the sector was that it should leverage the opportunity of the change at the normative level to engage the market directly.

The other point that came up was the question of incentives: given that banks are not (yet) a public utility, and there is 'currently no demand from the market to solve the problem' (A5) of NPO financial exclusion, how does one go about creating the right incentives for financial institutions to bank and service non-profits? One promising avenue highlighted by the students at New York University's Public Interest Law Clinic (NYU Paris EU Public Interest Clinic 2021), with support from HSC and Dutch bank ABN-AMRO, is **including the issue of de-risking of NPOs as a salient business and human-rights issue for banks**.

The argument follows that under the UN Guiding Principles on Business and Human Rights (UNGPs), banks have a duty to prevent, address and remedy human-rights abuses committed in their business operations. When de-risking of NPOs occurs, and NPOs are denied financial access, this has human-rights impacts on their work and their beneficiaries. As it stands now, banks often interpret their obligations under these principles as harms resulting from their provision of services, and the argument the paper makes is that withdrawing services also has impacts that should likewise be considered. The responsibility to respect human rights in the context of de-risking specifically would entail that banks 'act with due diligence to avoid overzealous, unnecessary or discriminatory de-risking. Clear examples of this include a generic refusal to bank Muslim NPOs [BBC 2015] or the freezing of assets of an NPO client at the request of a government for politically-motivated reasons' (NYU Paris EU Public Interest Clinic 2021).

Furthermore, according to the UNGPs, states have a duty to protect those who suffer human-rights harms due to business behaviour. In doing so, they should actively work to mitigate de-risking and assure policy coherence for governmental departments, agencies and other state-based institutions that shape business practices, including for those that shape and enforce AML/CFT legislation.

Many interviewees felt that abolishing R8 would not solve the problem of financial exclusion for NPOs. The 'deeper issue', one said, 'is the simplistic risk assessments that banks are making, not only towards NPOs, but NPOs are a victim of this' (A5). Another concurred, saying that they did not know how a removal of R8, for example,

> would affect the US approach. At the end of the day, because of the Patriot Act, the concept of customer due diligence and enhanced due diligence is so ingrained in the culture here … It is like the question on foreign PEPs [politically exposed persons] – there was clarification given that by law it is only foreign PEPs that are subject to enhanced due diligence, not domestic ones, but the banks still treat them both the same.
>
> (A4)

Conclusion

In terms of the market, then, a revolutionary approach would entail a **recalibration of the concept of risk**. There are two prongs to this: one is to construct risk in a manner that is more multidimensional than it is now. The other is to interrogate the foundational aspects of how risk is seen today. Academic Louise Amoore, writing about current constructions of risk, says, 'Risk in the mode of possibility rather than strict probability, does not govern by the deductive proving or disproving of scientific and statistical data but by the inductive incorporation of suspicion, imagination, and preemption' (Amoore 2013: 10). This 'possibilistic' mode of risk governance needs reining in. The other potential revolutionary approach would be **removing a layer of regulation when another is added**, to avoid the current accretion that we now see, which does not lead to either efficiency or effectiveness.

In terms of the evolutionary, there needs to be a **rethink on where the risk-based approach sits** and whether it is better served by moving it from the regulated (banks) to the regulator. There **needs to be a proliferation of multi-stakeholder dialogue processes** at national, regional and international levels to find technical and systemic solutions to financial access challenges facing NPOs. NPOs need to be included in the design and development of financial-crime compliance solutions. Moreover, the market needs to be engaged proactively on changes in the norms and guidance. Last but not least, there needs to be thought given to **creating incentives for financial institutions to bank non-profits**, thereby creating demand from the market to solve the problem of NPO de-risking.

CHAPTER 5

FATF ACCOUNTABILITY: 'WHY KILL THE GOLDEN GOOSE?'

The measures adopted by states to counter terrorism have often posed serious challenges to human rights and the rule of law. While the FATF has recognized that its standards often have unintended consequences, critics across the board, including some of our interviewees, question whether the FATF system in its current form has the ability to either respond to or take responsibility (be accountable) for these consequences. This conclusion links to questions surrounding the FATF's status as a 'soft-law' body, its general lack of oversight and transparency, and the role and responsibility of its regional bodies, or FSRBs. This section aims to explore these questions and suggests avenues towards greater accountability.

Holding states accountable

In 2005, as a response to the human-rights violations occurring in the name of countering terrorism, the UN decided to create a mandate for a special rapporteur on the promotion and protection of human rights while countering terrorism. In 2006, the rapporteur at the time stressed the importance of ensuring that all decisions that limit human rights are overseen by the judiciary so that they remain lawful, appropriate, proportionate and effective, and so that governments may ultimately be held accountable for limiting the human rights of individuals (UNHRC 2006: para. 29).

In line with this recommendation, a first step for the FATF in creating more accountability at state level would require the **explicit encouragement of member states to implement independent oversight** and accompanying judicial review processes to tackle human-rights abuses in the implementation of CFT penalties (UNHRC 2023a). Certain states, such as Canada, France, New Zealand, Nigeria, the UK and South Korea, have introduced mechanisms for assessing the human-rights impacts of draft counterterrorism laws and systems that can also react to the potential consequences of such assessments. For example, the attorneys general of New Zealand and Canada have reporting obligations to parliament when pending legislation appears to be inconsistent with the country's domestic human-rights obligations. In some other countries, there have been successful appeals on laws with burdensome reporting requirements, such as in France and Nigeria (Spaces for Change 2022). Finally, in the UK, South Korea and Australia, specific oversight mechanisms for counterterrorism policy have been created, which the FATF could promote in its guidance papers, thematic reviews or other external communication to member states.[14]

Second, the FATF has in fact clarified, in interpretative notes (to Recommendations 8 and 6 for example) and related guidance documents, that, in implementing its recommendations, states should not breach fundamental public international-law obligations, including international human-rights law, international humanitarian law and refugee law. If the FATF indeed believes that upholding human rights and protecting humanitarian work are just as important as the fight against counterterrorism, it needs to first **provide more detail on what implementing its standards would look like with reference to existing international-law obligations and, second, what legal avenues of accountability would look like**. As one interviewee mentioned, 'There is an argument to hold[ing] FATF to account to encourage them to broaden the evaluation of policies and look at it more holistically [such as including human rights and humanitarian law]' (F2). They could, for example, be more explicit in their communications about what the actual potential consequences

14 South Korea has set up a counterterrorism human-rights protection officer who not only gives advice and recommends improvements concerning the protection of human rights but also handles civil complaints related to human-rights violations that have arisen during counterterrorism activities. The UK has appointed an independent reviewer of terrorism legislation who provides a robust challenge to the government and the police and vigorous independent oversight to ensure that legislation is fair, proportionate and effective. This office publishes annual reports alongside the biometrics commissioner and the investigatory powers commissioner.

of breaches of human-rights obligations are for states, and thereby more explicitly serve the cause of accountability.

Also, and building on our arguments in previous chapters, it has become clear that the FATF must (re)act much faster to unintended human-rights consequences than it has done so far in order to be effective. RUSI notes that it is significant that where new risks are identified (such as for cryptocurrencies), the FATF has the capability to respond very fast, '**yet when unintended consequences are identified, progress is glacial, at best**' (Keatinge et al. 2021), as demonstrated by the time it has taken to modify R8. An accountable process would thus not only entail the promotion of independent oversight mechanisms at state level but would also entail a quicker response by the FATF to unwanted state behaviour. The aforementioned 'early warning and response mechanism' could be an avenue to speed up this process. To guarantee speedy (re)action, the monitoring of the FATF response would be key, preferably by an ombudsperson or other type of independent body (see next section).

The accountability of the FATF itself

Transforming the FATF's legal status

According to its mandate, the FATF is currently an 'intergovernmental body' 'not intended to create any legal rights or obligations' (FATF, Financial Action Task Force, Mandate (2012–20), paras. 1, 48), implying that no parties can hold the FATF legally accountable for non-compliance with its own mission and mandate. Simultaneously, some describe it as 'a club-like institution dominated by a select group of like-minded states networking at a ministerial level' (Tilahun 2021: 1). It is not surprising that this status has made the FATF particularly vulnerable to abuse (see UNHRC 2019a: para. 31) because 'the uniquely coercive yet voluntary character of the FATF' (Pursiainen 2022) creates a challenging environment in terms of accountability for human rights. The question posed here is, therefore, whether formalizing the legal personality of the FATF would have any impact on its accountability.

We will talk generally about the broader definition of accountability, meaning **to be responsible to the public for decisions and actions and to be expected to explain them when asked**. The stress is put on 'being answerable to somebody' and includes the various aspects relevant to holding public institutions to account, such as through good governance and transparency. This definition is much broader than liability, being the state of 'being legally responsible' for something. It is important to note that the latter does impact the former. The literature and interviews referred to in this paper clearly indicate that the perception of the FATF being a 'non-institution', and the attendant lack of liability, contribute at the very least to the feeling that the organization is too ambiguous to be held meaningfully accountable. There exists a perception among many that 'upon gaining (international) legal personhood, the whole armour of the law (domestic and international) would be brought to bear upon the actor' (Tilahun 2021: 6) and true accountability could be achieved. So, why not promote the transformation of the FATF into a legal person or formal international organization?

Tilahun suggests that the formal reorganization of the FATF could give rise to more accountability of the organization, **particularly for normative clarity and peer accountability**. The emergence of a permanent secretariat that operates independently of its member states could trigger review mechanisms by peers of the FATF, which is difficult to achieve in the absence of a legal personality. The FATF is currently already embedded within global networks, and there is evidence from its practice that it is 'not immune to peer nudge' (Tilahun 2021: 9) of, for example, the IMF or the World Bank, on adopting notions of financial inclusion and sustainability into its workings: items that did not necessarily have a place in FATF language at the beginning. Formalization could only amplify this pressure. Formalization could also better facilitate the creation of a complaints mechanism where external stakeholders could share their grievances in a more structural manner, as opposed to the merely ad-hoc manner that it allows for at the moment. More importantly, 'it would then be possible to speak of harm caused by the FATF as a matter of illegality' (Tilahun 2021: 12). The ability to express condemnation against the FATF within a legal framework would almost certainly arm those communities who have become victims of FATF policies and would strengthen their voices on the international stage.

If only it were that straightforward. There are several arguments to be made around why this formalization would not necessarily render the anticipated results. We summarize the disadvantages here and weigh them against the potential advantages of formalization. First, even though there is a strong perceived need by critics and academics alike that formal international organizations should be held fully liable and accountable, there is still a debate as to what international-law obligations are applicable to international organizations (Klabbers 2017). Reality shows that in legal systems and beyond there remains 'confusion surrounding some core parts of the responsibility of the international organization. The ease with which the UN can still elude fundamental issues of responsibility' is an example of this (Boon and Megret 2019).

Second, Tilahun (2021) proposes that there are risks of the FATF keeping its informal modus operandi even after it potentially formalizes because existing contested norms produced by a current unaccountable body would be moved into a permanent body of international legal order, which is harder to change once it has been formalized. This is in line with the worry of the Special Rapporteur about the risks of adopting soft-law norms into hard-law standards without proper human-rights expertise and input in their creations (see Chapter 3). Finally, there exists the risk that formalization could lead to backlash from the more powerful member states who want to maintain control of the FATF and may seek 'to tame the organization (e.g., through funding) or substitute it with other, more exclusive/less-accountable entities' (Tilahun 2021: 17). A consequence could be the retreat of those actors into less visible forums of decision-making or from the organization itself because the gains would no longer outweigh the cost of participation.

In sum, the sentiment among the majority of interviewees seems to be that formalization would 'kill the golden goose': 'The FATF has many flaws but at least they are listening to critique from NPOs and trying to rectify things' (D2). Multiple interviewees shared that the **current agility of the FATF, due to its non-status, has been beneficial** for them. In the words of one interviewee:

> I got different legal opinions on what the legal standing of FATF really is and should be. The issue is, if you gave it a legal framework and treaty you would turn it into a bigger bureaucracy and make it more difficult to address and change things. Ministries of foreign affairs and ambassadors would be involved. It works to our advantage now, the way it operates … I thought it should be a more official international organization at first, but now I think, maybe it shouldn't.
>
> (F2)

The argument that the FATF is currently able to make relatively agile and quick decisions, with thirty-nine members at the table, is one that is also supported by others, and there appears to be hesitation about embedding FATF into, for example, the UN system: 'The fear is that they are currently doing better than UN counterparts. This may [be] dilute[d], and I am not sure they would be more productive if they lose their agility' (B1).

That being said, where formalization would at this stage perhaps not be the way to go, **this does not preclude the secretariat and member states from increasing their efforts to create an accountability mechanism**. This is in line with the proposal of RUSI that the FATF needs to introduce an ombudsperson (and staff), funded by FATF members, who investigates and represents related grievances (Keatinge et al. 2021). It is important to note that a scoping paper by NYU's Public Interest Law Clinic found that the ability of ombudspeople in Europe to independently and fairly analyse complaints depends on the rules within their mandate, and, for most, addressing the issue of de-risking did not fall within the scope of their mandate.[15] Nevertheless, the Irish Ombudsman was involved in a case regarding the termination of an NPO's bank account, and the UK Ombudsman's mandate allows them to deal with the right of all customers to receive equal access to banking services without discrimination. When designing an FATF ombudsperson office, it would therefore be key to draw lessons from existing ombudspeople who have dealt with de-risking complaints before, such as in the UK and Ireland. In summary, interviewees are in agreement that the FATF, as

15 NYU Paris EU Public Interest Clinic, Concept Note: Securing Redress for 'De-risked' Non-profit Organizations, 2019.

a non-institution creating soft-law standards without human-rights expertise, should not have as much power as it has, without appropriate checks and balances.

Transparency

The right to access to information is based on the broader right to freedom of expression and entails the right of every individual to seek and obtain information held by public authorities. Not only have national laws in multiple jurisdictions been developed over the years to align with this right, but institutions such as the World Bank have also followed suit, with assurances that it will disclose any information in its possession that is not on its list of exceptions and claiming that that has enabled the organization to 'become a global leader in transparency in how it makes information available to the public' (World Bank n.d.).

That the FATF's procedures largely appear to happen behind closed doors is, for many, not only outdated but also unacceptable. According to RUSI, 'Much of its process and decision-making is opaque, punctured only by the social media posts of those that are "in the room" and frustrated by its actions' (Keatinge et al. 2021). Interviewees to this study also flagged the **lack of transparency as a major obstacle in achieving any type of accountability**, not only at FATF level but also in terms of the communication between FSRBs and governments. One interviewee mentioned that 'the recommendations that come out of the country visits should be more transparent: it is now a black box. If there is no report written on whether there was a common understanding [there is no way to find out what was discussed]' (C4). Along these lines, an interviewee (B3) advocated for transparency of draft MERs and for these to be published for public comment before they are adopted to allow civil society an opportunity to correct errors. Another, speaking of possible FATF/FSRB intervention around issues related to R8 implementation in a country, said, 'We don't know what the FATF communicates with the government; we only found out that they had an interaction on this [implementation of R8] based on our meeting with authorities' (E3). If you see accountability as a way in which stakeholders can examine the activities of an institution, **those impacted by the FATF standards need to, at the very least, be able to clearly see how their input is being addressed** in the countries where they operate.

Accountability and transparency around FATF funding

While the FATF budget is public (and published in their annual report), what is opaque is who funds this $12 million budget and how. Like many multilateral institutions, we know that the FATF budget consists of a mix of annual mandatory and voluntary contributions. The mandatory (or assessed) contributions are small and based on the size of the country's economy. This is topped by voluntary contributions, and it is unclear whether countries earmark these for particular projects. An interviewee mentioned that since the terrorist attacks in Paris in 2015, France has given the FATF €1 million a year, which 'provides funding for communications and FSRBs and translations' (F2).

It is also unclear from which pots of money member states fund the FATF. The UK, for example, uses money from its overseas development assistance budget to fund the FATF because it has realized that it can 'fund this using development aid as it is linked to a specific SDG on illicit flows' (F2). And, while SDG 16 (and more specifically Indicator 16.4.1) does talk about tackling illicit financial flows, this **funnelling of overseas development assistance money to the FATF demands more interrogation**, given that the FATF framework is being deliberately misused in many countries to undercut development goals, thus hampering the achievement of the very same SDG.

Thoughts on strategic litigation

> *Civil society organizations have built incredible technical expertise on CFT matters and have secured direct policy changes with regard to the human-rights impacts of state CFT implementation, through constructive engagement with the FATF. However, one avenue that has remained less*

> *explored is the pursuit of state responsibility for human rights violations committed in the name of international CFT compliance*.
>
> (Yamamoto and Ní Aoláin 2023)

A final avenue for accountability could be using the courts to pursue responsibility for human-rights violations committed in the name of FATF compliance. **The question is, however, how one would litigate the FATF framework**. Some states have tried to dispute the compatibility of certain FATF standards with fundamental international human-rights law norms, without much success. In 2006, in Denmark, constitutional opposition arose from concerns over the compatibility of the standards with fundamental rights, and the Danish tried to convince the FATF that the alternative administrative mechanism (for asset freezing in this case) advocated for by the FATF did not appear to be consistent with the Danish Constitution, the European Convention for Human Rights and its first Additional Protocol. Then Norway explicitly raised human-rights concerns during its evaluation, arguing it could not properly implement UN Security Council Resolution (UNSCR) 1373 (2001) and Special Recommendation III while meeting international obligations concerning the respect for human rights and the fight against terrorism. However, after a long battle, as soon as the scope of the FATF standards was settled on these topics and the obligation under the FATF recommendations was made clearer, both countries felt compelled to comply after all (Pursiainen 2022: 167). Still, considering the ever-increasing use of CFT measures at the national level and greater knowledge of requirements such as R8 in particular, legal scholars have predicted '**an uptick in national litigation' in CFT-related human-rights disputes** (Yamamoto and Ní Aoláin 2023).

Some interviewees shared the concern that they 'do not see a national judge trying to understand how FATF works' (E4) but that maybe there is more of a chance of generating interest at the regional human-rights mechanisms and with human-rights commissioners:

> We keep saying we need to raise this issue with the regional human-rights commissioner. They are not aware [of what is happening in the name of FATF compliance] and we need to educate them. Those who talk on our behalf at the regional level need to know what is going on.
>
> (E4)

In their analysis on the different paths of legal strategic litigation on violations committed in the name of CFT compliance, Yamamoto and Ní Aoláin mention that CFT-related communications before the human-rights treaty bodies present 'a unique opportunity for the express legal affirmation of the primacy of human-rights law in the face of purported CFT aims. It also provides for the capacity to bring transparency to the actions of states broadly utilizing CFT measures, a commodity whose absence is glaring in the counter-terrorism regulatory context' (Yamamoto and Ní Aoláin 2023: 715). In addition, at the European Court of Justice, through the Kadi case, there is some precedent on the litigation of human-rights violations in the context of CFT measures. In this case, the court determined that the freezing of Mr Kadi's assets was unlawful despite it being done to implement Security Council Resolution 1267, as it was not compatible with the EU Charter's position on human rights and fundamental freedoms. The appeals judge stated, 'The fact that the measures at issue are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law' (see InfoCuria 2008). Civil-society groups may further explore how to use the Terrorism Financing Treaty for strategic litigation in regional courts.

Finally, if truly serious about accountability and the assumption that CFT measures need to comply with international law, the FATF itself could also, in and through its publications, provide an overview of the different avenues (courts and treaty bodies) for accountability for affected stakeholders. Concrete examples of case law on human-rights violations in the context of CFT policies generated through those avenues could be set out. As decisions in most international courts and treaty bodies are made public, these could then also be further integrated into FATF communications.

Conclusion

> *'The power of the FATF is incredible. It is determining the fate of whole countries. [We are witnessing] risk aversion on legs. It is also driving gross overcompliance. This power needs to be reined in'*
>
> (G1).

In line with this quote from one of our interviews, we conclude that there is a consensus that the FATF's powers need to be limited in one way or another. But who will make them do it? Will member states or brave civil-society organizations further explore litigation and the courts to restrict the power of the FATF and the sway that its policies have? Will UN human-rights bodies be able to increase their pressure on the FATF to incorporate human-rights standards and knowledge into their implementation? Will peer institutions such as the World Bank convince the FATF that they too need policies on transparency and the establishment of an independent complaints mechanism? Or will there eventually be enough support to transform the legal status of the FATF into a formal international organization despite the potential risks such formalization might entail? No matter what the answers to these questions are, it may be concluded **that the FATF needs to increase oversight, particularly to harness positive consequences for accountability**. How they take on this task will have to be at front and centre of the discussion going forward.

CHAPTER 6

CONCLUSION: LEAVING BEHIND, TAKING FORWARD, AND DILEMMAS TO PONDER

While there is increasing recognition that the (mis)implementation of the financial-integrity standards of the FATF has had a damaging effect on civil society in many contexts and on the civil society operating environment worldwide, there is also a fear that the gains made in the past few years, including through the persistent advocacy of the Global NPO Coalition on FATF, might be in danger of backsliding. Conflicts in Ukraine and Gaza have once again served to harden counterterrorism rhetoric, but it is incumbent on us to **remember the lessons of 9/11** and the **need for states to act in a proportionate manner and within the law**. Sans an adherence to international human rights and humanitarian law in response to even egregious acts of violence, states will only help create the conditions that are conducive to further violence, thus perpetuating a never-ending cycle.[16]

Leaving behind

In terms of the FATF framework on NPOs, we definitely need to leave behind the non-risk-based approach when it comes to the sector. As the revised interpretative note to R8 states very clearly:

> It is not in line with Recommendation 8 to apply measures to organizations working in the not-for-profit realm to protect them from TF abuse when they *do not fall within the FATF's functional definition* of NPOs. It is not in line with Recommendation 8 to implement any measures that are *not proportionate to the assessed TF risks*, and are therefore overly burdensome or restrictive. *NPOs are not reporting entities* and should not be required to conduct customer due diligence.
>
> (FATF 2023c: 62; emphasis added)

In addition, we **need to leave behind the use of language on human rights and international law when the application of these laws is not specified or explained**. Including the standard phrase, 'in compliance with international law, including human rights, humanitarian and refugee law' in standards and guidance without pointing towards what specific infringements of rights we are talking about, at best, means nothing. At worst, it can create the false illusion that these rights have been seriously considered as foundational for the policy in question, which appears to often not be the case. These statements need to include the specific law and obligations that guide states to that end.

Furthermore, there needs to be more **consistency in evaluation reports** in terms of format, areas of concern and the underlying data. The content of the reports depends too heavily not only on unreliable and unverifiable data but also on the luck of having an assessor with the right qualities for the job (and not just any randomly selected junior government staffer). Minimum quality standards, including civil-society knowledge, are needed.

Taking forward

A big task in the future will be around helping socialize and also monitoring the **socialization of the latest changes** to the recommendation and the revised guidance paper. As set out in this paper,

16 See (ex-)UN Special Rapporteur Fionnuala Ní Aoláin's comments at a UN press conference (Rami Ayari, X [formerly Twitter] post, 23 October 2023, https://t.co/SPTtNlVAkm).

however, this alone will not be enough to prevent all of the (un)intended consequences we see today. What is needed is **changes to the FATF methodology** so that assessments can call out disproportionate regulation, NPO suppression and NPO de-risking when they see it. Coupled with that is the **importance of training**, both for assessors and for jurisdictions, which includes sensitization on the sector as well as the fundamental rights and freedoms that countries need to uphold (and that are too often seen as derogable in the face of countering terrorism). The **disproportionate weight given to NPOs in the IOs** (the effectiveness measure of the standards) needs addressing, and related to that is **the exceptionalism meted out to the sector** in the standards as a whole. Going forward, whether the discussion on the removal of R8 is on the table or not, the exceptionalism that NPOs as legal entities face in the framework needs to be robustly debated.

Further, the whole **issue of grey-listing** needs highlighting, whether that is more transparency around the process or taking a hard look at why only low- and middle-income countries end up on the grey list (a form of 'regulatory colonialism') when we know that much of ML is enabled and facilitated in high-income (FATF-member) jurisdictions. Interviewees pointed out that much of the harm they see in terms of restrictions to civil society stem from the jurisdiction being put on the grey list in the first place.

This paper talks extensively about the fundamental rights and freedoms deficits in the standards per se, and what the FATF can do to fix that, as well as in the implementation of the standards. And, while we speak of this policy imperative, there are also other policy objectives such as sanctions (and the increasing use being made of them) and humanitarian aid. There needs to be more **joined-up thinking across government on how to implement financial-integrity rules and norms while at the same time ensuring financial inclusion and not impacting humanitarian, development, rights and peacebuilding imperatives**. Currently, these policy objectives are often at cross-purposes. For example, as one of our interviewees (G1) noted, UNSCR 2664 on a standing humanitarian exemption across all UN sanctions regimes is frustratingly difficult to implement on the ground, given that it butts up against national counterterrorism legislation, so that something that is allowable under UNSCR 2664 and sanctions legislation may not be allowable under CT legislation.

Issues around **FATF accountability, transparency, governance and funding** are also matters that need to be discussed on an ongoing basis, with different accountability mechanisms considered and fleshed out, transparency demanded and both governance made more inclusive and funding more transparent.

Dilemmas

These are some issues that need deeper thinking and further research to build out fully, which are critical to ensuring that TF is tackled effectively without hampering legitimate charitable activity.

- **Rethinking risk**: Currently extremely one-dimensional, how can the construction of risk be made more holistic? Are we factoring in the risk of an overly securitized approach that cripples civil-society activity and thereby harms humanitarian, development, human-rights and peacebuilding work – work which, at the end of the day, helps mitigate the terrorism risk? Additionally, how can the visualization of risk move from the current 'possible' thinking (of even a miniscule chance being treated as a certainty in terms of response) to a scientifically more rigorous 'probable' thinking mode?
- **Rethinking where the risk-based approach sits**: Is it appropriate that the risk-based approach is downstreamed to the regulated entity (in this case, the banks)? Is the calibration of risk not more appropriately handled at the regulator level?

- **Banks as public utilities:** Should a bank account be seen worldwide as a public good? How can we further embed de-risking and negative human-rights impacts that follow from bank action into the business and human-rights debate and, moreover, into the UNGPs? As the responsibility to

respect human rights in the context of de-risking would entail that banks act with due diligence to avoid overzealous, unnecessary or discriminatory de-risking, what guidance do banks need to ensure that the outcomes of de-risking become embedded in that human rights due diligence?

- **Architecture change**: After 9/11, CFT was forcibly attached to the existing AML architecture in the FATF framework. They are two very different beasts, as has been pointed out by many. Should CFT not logically reside with the counterterrorism sanctions architecture? Would this result in less policy incoherence? And where should this sit, ideally?
- **Multipolar world**: The power of the FATF system derives in large part from the fact that the dollar is the world's reserve currency. With increasing rumblings around grey-listing, coupled with the fact that we now live in a multipolar world, it is not hard to imagine a not-too-distant future where the dollar has lost its pre-eminence and states start withdrawing from the FATF system altogether. Countering this will involve making the system more effective to deliver on its mandate, more attuned to context and more cognizant of inadvertent harms caused. If not, is a break-up of the FATF system a foregone conclusion?
- **Foreign funding and foreign influence**: States have used or referred to the FATF framework to put foreign funding restrictions in place (such as the Foreign Contribution Regulation Act in India), which have in turn greatly impacted the work of civil-society organizations. While these restrictions have been internationally decried in past years, many others are now jumping on the bandwagon, with the UK introducing a 'Foreign Influence Registration Scheme' (Forest et al. 2023) for organizations and individuals, and the EU considering a 'foreign agents' law. Western countries often fund oppositional trends and movements in non-Western countries while at the same time struggling with 'foreign' funding into Western societies. Is 'civic space' exclusive in terms of the value system it upholds? And if money flows are the carriers of value-driven interventions, which interventions could then be classed as 'risky'?

We hope this piece has laid out the problematics inherent in the status quo and offered some food for thought on the potential way forward, both evolutionary and revolutionary.

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